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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948

No. 873 101

MARK A. FREEMAN, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, Mark A. Freeman, defendant and appellant below prays that a Writ of Certiorari be issued by this Court to review the judgment of the Circuit Court of Appeals, for the Seventh Circuit, entered April 15, 1948, (R. 899) affirming a judgment of the United States District Court, for the Northern District of Illinois, Eastern Division. The Petition for Rehearing was denied May 17, 1948 (R. 920).

Opinion of the Court Below

The opinion of the Circuit Court of Appeals, rendered and filed April 15, 1948, is set out in the printed record at page 890 to 898. It has not yet been published in the Federal Reporter.

Statement of the Matter Involved

The petitioner was one of thirteen defendants named in an indictment returned February 26, 1943. One of the defendants, Garfield, died prior to the trial, two received directed verdicts, and as to all of the rest, the jury disagreed. The verdict (of guilty against petitioner) was returned by the jury March 2, 1946, whereupon the District Court imposed sentences of five years on eleven of the twenty-eight substantive counts of the indictment charging the use of the mails to defraud, and two years on the twenty-ninth count charging conspiracy, the sentences to run concurrently.

It was brought to the attention of the Court of Appeals below, that in the trial of the case there were many errors, each of which was specifically and directly presented. The Court of Appeals, however, did not adequately or completely exercise its reviewing functions, but attempted to spell out guilt from the entire record, disregarding the admonition of this Court to the effect that the underlying question on appeal "is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in Federal courts." *Bollenbach* v. *United States,* 326 U. S. 607, 614.

At the trial, evidence tendered by petitioner of innocent intent was excluded, documents essential to the Government's case were admitted in evidence without any foundation, testimony was received of the impressions and opinions of a material Government witness whose testimony was

largely hearsay, the trial judge manifested a biased and markedly hostile attitude toward petitioner, the United States attorney in his concluding argument to the jury was guilty of improper, unfounded and inflammatory remarks in which, without evidence, he called petitioner a liar, a thief, a confidence man, and an old hand at the game, and the jury was inadequately and incorrectly charged by the trial court. These circumstances were either passed upon cursorily or not touched upon at all.

The instant application involves the opinion and the judgment of the court below which has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the trial court, as to call for the exercise of this Court's power of supervision.

Comprehensively to present petitioner's position in this respect, and for an adequate understanding of the issues, it is necessary that a reasonably complete statement of the case be made. It is impossible in a summary or short statement, to point out the individual and cumulative effect of the many errors which appear in the nine hundred page printed record. To that end, and for the Court's convenience, such a statement of the case is attached to the present petition and brief as an appendix.

The decision of the court below, moreover, is in conflict with the decisions of other circuit courts of appeal, and is in conflict with the applicable decisions of this Court.

At the opening of the trial, the defense moved to require the Government to elect whether it would proceed on the substantive counts or the conspiracy count, the conspiracy count being, in effect, a mere repetition of the substantive counts, provable, and actually proved, by identical evidence submitted under similar instructions. The Sixth Circuit has decided that such a motion is proper. Furthermore this Court in *Sealfon* v. *United States*, 68 Sup. Ct. Rep. 237, 239, 332 U. S. 575, has rendered a decision the

logical consequence of which supports such applications to require the prosecution to elect. The effect of and necessary implications from the opinion in the *Sealfon* case should be clarified and announced by this Court. The Court of Appeals, without attempting to apply the test as to identity of offenses, summarily dismissed the petitioner's contention on this issue as "frivolous and undebatable" (R. 890-1).

The decision below, furthermore, in confirming the admissibility in evidence of books of account without any foundation, is in conflict with the decisions of other circuits, notably *Hoffman* v. *Palmer,* 129 F. 2d 976 (CCA 2). It is in conflict, moreover, with the decision of this Court affirming the Second Circuit in *Palmer* v. *Hoffman,* 318 U. S. 109, 113-115. The opinion fails to observe the requirements of Sec. 695, of Title 28, U.S.C.A.

The Court below held the indictment sufficient, although as to the thirty-one charges of false representation there is no allegation of time, place, person or circumstance. The decision conflicts with the opinion of the Eighth Circuit on a similar question. *Fontana* v. *United States,* 262 F. 283, 286 (CCA 8) and other cases.

There was no evidence to the effect that petitioner authorized, had knowledge of, or approved any of the misrepresentations alleged to have been made by representatives of the company, and no proof that petitioner was otherwise guilty of fraudulent conduct. The court below failed to give any consideration to petitioner's point that there was no substantial evidence to support a verdict of guilty.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; Title 28, U.S.C.A. 347).

Relevant Parts of Statutes Involved

Title 18, U.S.C.A., Sec. 338:

"Whoever, having devised, or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Title 18, U.S.C.A., Sec. 88:

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States, in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

Title 28, U.S.C.A., Sec. 695:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurence, or event

or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility."

The Questions Presented

I

Did the Circuit Court of Appeals err in approving the action of the trial Court excluding relevant and material evidence bearing on the question of petitioner's intent, and was petitioner thus denied due process and a fair trial?

II

Did the Court of Appeals err in summarily dismissing petitioner's point to the effect that the trial Court erred in denying petitioner's motion to require the prosecution to elect as to whether it would proceed on the substantive mail fraud counts or on the conspiracy count of the indictment, the conspiracy count being a mere repetition of the substantive counts, provable and proved by identical evidence?

Did such ruling violate Article V of the Amendments to the Constitution of the United States in placing petitioner in double jeopardy and subject to double punishment?

III

Did the Court of Appeals err in approving the action of the trial Court in admitting the testimony of Government accountants who attempted to summarize the books of account and records of Consolidated Associates, Inc. which were permitted to be introduced in evidence without requisite identification or foundation?

IV

Did the Court of Appeals err in confirming the action of the trial Court in admitting the testimony of post office inspector Sugg as to his investigations, declarations, conclusions and opinions, by means of which testimony hearsay evidence was received under the guise of conversations with petitioner?

V

Did the Court of Appeals err in ignoring petitioner's point that the action of the trial judge, in the conduct of the trial, was unreasonable, arbitrary and hostile to petitioner, preventing petitioner from receiving due process and a fair trial?

VI

Did the Court of Appeals err in approving and complimenting that portion of the argument of the United States attorney, unsupported by any evidence in the record, to the effect that petitioner and the other defendants were a "bunch" which "duped" the investors, and that the defendants were thieves, liars, confidence men and old hands at the game, thus characterizing the defendants, in effect, as habitual criminals?

VII

Did the Court of Appeals err in failing to pass upon the specific points of objection by petitioner to the final instructions to the jury and in approving such final instructions on the ground that certain unexceptional but unilluminating general language as to the burden of proof and intent satisfied petitioner's right to have the jury properly instructed?

Is a final charge to a jury which treats the substantive mail fraud counts and the conspiracy count interchangeable as a conspiracy and which fails to distinguish the sub-

stantive counts from the conspiracy count, such a misdirection as constitutes prejudicial error?

May a trial court, actuated by resentment over a remark by defense counsel, eliminate from the consideration of the jury, after final argument, evidence previously received bearing on the question of petitioner's intent?[1]

VIII

Did the Court of Appeals err in failing to give any consideration whatsoever to petitioner's point that there was no substantial evidence establishing the material allegations of the indictment against petitioner?

Did the Trial Court err in refusing to direct a verdict of not guilty and did the Court below err in abandoning its function of review in connection with this point?

IX

Did the Court of Appeals err in approving an indictment charging thirty-one different false representations alleged to have been made to eighty-eight persons named and to others unnamed, by one or more of the thirteen indicted defendants without any indication of time, place or other circumstance? Does such an indictment satisfy the requirement of this Court that every element of which the offense is composed must be alleged with precision and certainty? May a defendant under such an indictment be called upon to meet on each of the thirty-one charges that at any time or place and to any person some one or more of such misrepresentation, chargeable to him, had been made? Does the instant indictment otherwise meet the requirements of good pleading in criminal cases?

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[1] The above specification of portions of trial court's final charge is not intended to include all of petitioner's point of objection on the instructions, a subject which will be discussed in the supporting brief.

Reasons Relied On for Allowance of the Writ

I

It is universally accepted that evidence of innocent intent, one of the few defenses remaining to defendants charged with violation of the Mail Fraud statute and conspiracy to violate, must be received in evidence, and any substantial deprivation of this right constitutes not harmless, but prejudicial error.

The Court below evaded this point made by petitioner by stating that petitioner's intentions were "better" displayed by his actions in particular dealings than by showing that competitive interference caused a failure of his project. The Court thus, while denying its right to weigh the evidence, actually weighed it. The Court further considered the admissibility of the tendered evidence on intent in connection with the remark by defense counsel stating that, "Regardless of whether the evidence was receivable or not, the comment of counsel was entirely improper" (R. 895). The Court failed to hold that the tendered evidence was irrelevant. In approving the action of the District Court excluding relevant and substantial evidence on the question of intent, the Circuit Court of Appeals so far departed from the accepted course of judicial proceedings, and so far sanctioned such a departure by the trial Court as to call for the exercise of this Court's power of supervision.

II

In holding that the District Court did not err in not requiring the prosecution to elect whether it would proceed on the substantive counts or the conspiracy count, and in brushing aside this contention of petitioner as patently wrong, the Court of Appeals erred in failing to perceive that a mail fraud indictment involving two or more defend-

ants is itself, in effect, a charge of conspiracy, and in deciding that both charges may coexist in the same indictment under practically the same language and provable by identical evidence. In holding that the defendant may be convicted under both counts, the Court ran counter to the gist of the decisions of this Court (see *Sealfon* v. *U. S.*, 332 U. S. 575, 68 Sup. Ct. Rep. 237, 239) and is in conflict with the decisions of other Circuits (see *Freeman* v. *U. S.*, 146 F. 2d 978 (CCA 6); *Krench* v. *U. S.*, 42 F. 2d 354 (CCA 6); *Hendry* v. *U. S.*, 233 F. 5 (CCA 6).

III

The Court of Appeals held that the books of account of Consolidated Associates, Inc. were properly admitted in evidence, and that the testimony of the Government accountants based thereon was valid, even though no foundation whatsoever was laid for such books of account and no testimony in identification thereof offered by the Government in compliance with Section 695 of Title 28, U.S.C.A., which requires that entries in books of account must appear to have been made in the regular course of business and that it was the regular course of business to make such memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. In so holding, the Court below disregarded the statute in an opinion which is in conflict with the opinions of other circuits and contrary to the decision of this Court; (See *Palmer* v. *Hoffman*, 318 U. S. 109; and *Hoffman* v. *Palmer*, 129 F. 2d 976 (CCA 2); *U. S.* v. *Grayson*, 166 F. 2d 863, 869).

IV

The Court of Appeals approved the action of the trial Court in admitting the testimony of post office inspector V. V. Sugg, in the course of which the witness, over ob-

jection, was permitted to testify, in the guise of conversations with petitioner, as to his investigation of complaints, his impressions, conclusions and his opinions as to the ethics of the business of the corporation. Such evidence was hearsay and irrelevant. The ruling of the Court below in this respect is in conflict with the decisions of other circuits; (see *Harrison* v. *U. S.*, 200 F. 662, 673 (CCA 6); *Mattson* v. *U. S.*, 7 F. 2d 427, 428 (CCA 8); *U. S.* v. *Sprengel*, 103 F. 2d 876, 882 (CCA 3)).

V

Petitioner pointed out to the Court below the biased and hostile attitude of the trial judge. The Court of Appeals wholly failed to consider or pass upon this point and thus so far departed from the accepted course of judicial proceedings, and so far sanctified such departure by the trial Court as to call for the exercise of this Court's power of supervision. Moreover, in approving the conduct of the trial by its silence, the action of the Court below is in conflict with the decisions of other circuits; (see *Gomila* v. *U. S.*, 146 F. 2d 372 (CCA 5); *Adler* v. *U. S.*, 182 F. 464, 472 (CCA 5); see also *People* v. *Godsey*, 334 Ill. 11, 18.

VI

The Court of Appeals was advised from the record that the United States attorney, in his final argument to the jury, was guilty of improper, unfounded and inflammatory remarks. The Court below noted only the least offensive of such remarks, stating that in its opinion they were justified except as to one portion as to which there might not be any evidence, the Court, nevertheless, coming to the insupportable conclusion that it thought such evidence existed, thus surmising facts outside the record. In so doing, the opinion of the Court departs from the usual

course of judicial proceedings which requires the exercise of this Court's power of supervision. Moreover, the opinion is in conflict with the opinions of this Court and lowers the standard of conduct imposed upon Government counsel by this Court and by other Circuit Courts of Appeal, tending to establish a precedent dangerous to defendants who are entitled to fair trial and due process; (see *N. Y. C. R. R. Co.* v. *Johnson*, 279 U. S. 310, 318; *Berger* v. *U. S.*, 295 U. S. 78, 88; *Beck* v. *U. S.*, 33 F. 2d 107, 114 (CCA 8); see also dissenting opinion of Judge Jerome Frank in *U. S.* v. *Antonelli Fire Works Co., Inc.*, 155 F. 2d 631, 661 (CCA 2)).

VII

Petitioner pointed out to the Court below the error and confusion in the instructions of the trial judge which have been outlined in the Appendix, and in the Questions Presented, supra 5. The Court confusedly interspersed its consideration of the instructions between a paragraph describing the indictment (R. 893) and another paragraph holding the indictment sufficient (R. 894). The Court selected three general paragraphs from the final charge, which were not criticized by petitioner, for favorable comment, concluding, by way of generalization, that the instructions were not, on the whole, unfavorable to the defendants (R. 893). The Court wholly failed to observe and pass upon the specific points made by petitioner as to many designated portions of the charge to the jury. Such an opinion requires the exercise of the supervisory powers of this Court, if any semblance of the rules of a fair trial is to be preserved. The failure of a Court of Appeals to pass upon serious questions raised by the instructions to the jury, leaves the defendant without legal right of review and compels him to hope that this Court will exercise its discretion in favor of reviewing the case.

VIII

There was no substantial proof at the close of all of the evidence establishing the material allegations of the indictment against the petitioner. The Court below erred in failing to consider petitioner's contentions in this respect. Petitioner was entitled to appeal to the Court below, a right which presupposes the duty of that Court to advise itself of the points made upon appeal and to pass upon them.

This Court should exercise its supervisory power and decide whether or not petitioner was entitled to have the Court below consider if there was any substantial evidence upon which the judgment of conviction could be based.

IX

The Court of Appeals was advised by petitioner under specific points of objection that the indictment in the instant case was defective and did not comply with the requirement of this Court as to the precision and completeness with which elements of the offense must be alleged. The Court was apprised, among other things, that the objective of the alleged scheme was indefinite and that the allegations with respect to misrepresentations were prolix, confusing and uncertain, that the indictment was in itself contradictory, and that the blanket conspiracy count, re-alleging, with virtually no more, the allegations of the substantive counts, contained all the infirmities of the counts so adopted. The only comment made by the Court below in its opinion on this point was, "in the absence of any specific criticism of the indictment, we hold the indictment was sufficient to state a cause of action" (R. 894). Such an opinion is an evasion and not a decision of the issues, and should be, for this reason, examined and corrected by this Court.

WHEREFORE, your petitioner respectfully prays that the Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Seventh Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the case entitled, United States of America vs. Mark A. Freeman, et al., docketed in that Court as No. 9069. And your petitioner prays that the judgment of said Circuit Court of Appeals be reversed, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just.

MARK A. FREEMAN,
By THEODORE E. REIN,
PAUL B. CROMELIN,
FRANCIS C. BROOKE,
His Attorneys.

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SUPREME COURT OF THE UNITED STATES

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No. 873

MARK A. FREEMAN,

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THE UNITED STATES OF AMERICA,

Respondent

TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the court below was rendered and filed April 15, 1948. It has not yet been printed and published in the Federal Reporter (2d series), but it is set out in the printed record at pages 890 to 898. The Petition for Rehearing was denied May 17, 1948 (R. 920).

Jurisdiction

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, Title 28, U. S. C. A. 347).

Statement of the Case

Believing it to be necessary for an adequate understanding of the points made upon this application, petitioner has made a comprehensive statement of the case, with complete record references, and has attached the same hereto as an appendix, to which the Court is respectfully referred.

Specification of Errors Intended to Be Urged

1. The Court of Appeals did not consider the materiality and relevancy of evidence of intent tendered by petitioner, or the effect of its exclusion, but, instead, concerned itself with the Government's evidence, holding it to be "better" than the proof offered by petitioner. The court erred in thus approving the action of the trial court excluding relevant and material evidence bearing on the question of petitioner's intent.

2. The Court of Appeals erred in dismissing petitioner's point to the effect that the trial court erroneously denied petitioner's motion to require the prosecution to elect as to whether it would proceed on the substantive mail fraud counts or on the conspiracy count of the indictment, the mail fraud counts being themselves, in effect, charges of conspiracy, and the conspiracy count being a mere repetition of the substantive counts, provable and proved by identical evidence.

3. The Court of Appeals erred in approving the action of the trial court in admitting the testimony of Government accountants who attempted to summarize the books of

account and records of Consolidated Associates, Inc., which books and records were permitted to be introduced in evidence without identification or foundation.

4. The Court of Appeals erred in confirming the action of the trial court, admitting the testimony of a post office inspector as to his investigations, declarations, conclusions and opinions, as the result of which hearsay evidence was received under the guise of conversations with petitioner.

5. The Court of Appeals erred in ignoring and failing to pass upon petitioner's point that the action of the trial judge, in the conduct of the trial, was unreasonable, arbitrary and hostile to petitioner, preventing petitioner from receiving due process and a fair trial.

6. The Court of Appeals erred in approving, and even complimenting, the argument of the United States attorney to the jury, unsupported by any evidence in the record, to the effect that petitioner and the other defendants were a "bunch" which "duped" the investors, and that petitioner was a thief, a liar and a confidence man, and an old hand at the game.

7. The Court of Appeals erred in failing to pass upon specific points of objection to the final instructions to the jury and in failing to hold that such final charge was confusing, inadequate, incorrect and unjustified.

8. The Court of Appeals erred in failing to give any consideration whatsoever to petitioner's point that there was no substantial evidence to support the material allegations of the indictment. There was no evidence coupling petitioner with any of the false representations charged in the indictment, which false representations were, and were treated by the trial court and the prosecution as, the gravamen of the indictment.

9. The Court of Appeals erred in approving the indictment which failed to satisfy the requirement that every element of the offense must be alleged with precision and certainty, and which was confusing, uncertain and contradictory.

Summary of the Argument

I

The Exclusion of Relevant and Material Evidence Bearing on the Question of the Defendant's Intent in a Criminal Case Is Erroneous and Constitutes an Unfair Trial and a Denial of Due Process.

The opinion of the Court of Appeals discloses that it did not have an adequate understanding of the case and that it approached its decision under the general belief that, from the entire record, petitioner was guilty of the offense charged.

The court wholly failed to pass upon this, and other issues presented, thus depriving petitioner of his right to have his case fully considered on appeal.

In so doing, the court disregarded the admonition of this Court that it is the duty of appellate courts to ascertain whether error appears and not to spell out guilt from the entire record.

Bollenbach v. *United States,* 326 U. S. 607, 614.

If error appears, there is a presumption of harm and the lack of prejudice must affirmatively be shown.

Bihn v. *United States,* 328 U. S. 633, 638;
Kotteakos v. *United States,* 328 U. S. 750, 761, 764, 773;
Fiswick v. *United States,* 329 U. S. 211, 217;
Bollenbach v. *United States,* 326 U. S. 607, 614.

The evidence disclosed that petitioner's company made a genuine and intensive effort to perform the contracts

with the customers. (R. 535, 540, 545, 547, 549, 550, 565, 763).

No attempted trade or switch from older to younger whiskey was attempted for about eighteen months after the original transactions. (R. 85-86). It was not until November, 1940, that a few barrels of younger whiskey as against thousands of barrels of aged whiskey appeared in the company inventory (R. 323). Petitioner tendered substantial evidence to prove that the failure of performance of the contract with the customers was due to the harrassing interference of powerful competition, including threats, misrepresentation to retail buyers, refusal to perform contracts, and unfounded complaints lodged with the District Attorney. (R. 548, 566, 572, 573, 607, 608, 613, 614, 640, 641, 642, 751, 753, 756, 757, 771, 772).

The tendered evidence in these respects was first limited by the rulings of the trial court, and finally completely eliminated from the consideration of the jury. (R. 815).

The court below was concerned only with the evidence offered by the Government, comparing, and hence weighing, such evidence against the proof tendered by petitioner. (R. 895, 896).

Material evidence bearing upon intent is vital to the defense and its exclusion is error.

Potter v. *United States,* 155 U. S. 438, 447
Miller et al. v. *United States,* 120 F. 2d 968, 970, 973 (CCA 10)
Kleeden et al. v. *United States,* 45 F. 2d 87, 88 (CCA 5)
Buchanan v. *United States,* 233 F. 257 (CCA 8)
Sparks v. *United States,* 241 F. 777 (CCA 6)
Hyde v. United States, 15 F. 2d 816 (CCA 4)

II

The Court of Appeals Erred in Dismissing Petitioner's Point That the Trial Court Erred in Denying the Motion to Require the Prosecution to Elect as to Whether it Would Proceed on the Substantive Mail Fraud Counts or on the Conspiracy Count of the Indictment.

There is a conflict of opinion in different circuits upon this point.

Freeman v. *United States,* 146 F. 2d 978, 979 (CCA 6)
Hendrey v. *United States,* 233 F. 5, 12 (CCA 6)

The above cases held that the motion to elect is proper.

This Court, in *Sealfon* v. *United States,* 332 U. S. 575 (Jan. 5, 1948), rendered an opinion the logical consequence of which is to sustain petitioner's motion to cause the prosecution to elect.

The decision in *Heike* v. *United States,* 227 U. S. 131, 144, to the effect that charges of conspiracy are not merged in counts charging substantive offenses, upon which the court below and other courts have relied, is not in point because, in the *Heike* case and other decisions of similar import, the substantive offense involved actual perpetration of the fraud, while in the case at bar the criminality in the substantive counts is the unlawful intent disclosed by the scheme to defraud, itself, actually, a conspiracy.

The applicability of the *Sealfon* decision, which was concerned with separate trials on substantive and conspiracy charges provable by the same evidence, should be determined as to cases where substantive and conspiracy charges, provable by the same evidence, are tried in a single proceeding.

In the case at bar the conspiracy count is actually a repetition of the substantive count and the evidence was indiscriminately admitted and the instructions given as to both.

III

The Court of Appeals Erred in Approving the Action of the Trial Court Admitting the Testimony of Government Accountants Who Attempted to Summarize Portions of Books of Account and Records Which Were Permitted to Be Introduced in Evidence Without Any Foundation.

There was no evidence whatsoever that the entries made in the books of account were made in the regular course of business, or that it was the regular course of business to make such entries, or that such entries were made at the time of, or within a reasonable time after, the transactions recorded, as required by statute.

Title 28, U.S.C.A., Sec. 695.

The only pretense of identification and foundation was that of a single witness who was employed for only a fraction of the relevant period and who, while so temporarily employed, worked upon only two of the many books and records of petitioner's company (R. 287, 288, 291, 297, 330).

The trial court held that no proof whatsoever was necessary as to the entries in the books of account. (R. 287, 288, 302).

Some of the records were missing. (R. 331, 778).

The court below dismissed petitioner's contentions in a single sentence, "There was no valid objection to their reception." (R. 897).

The decision of the Court of Appeals below is in direct

conflict with the decision of the Second Circuit and with the decisions of this Court.

Hoffman v. *Palmer*, 129 F. 2d 976, 986 (CCA 2);
Palmer v. *Hoffman*, 318 U. S. 109, 113-115.

The books of account were vital to the Government's case and to the judgment of conviction. Their admission, therefore, constitutes prejudicial error.

IV

The Testimony of Post Office Inspector Sugg as to His Investigations, Declarations, Conclusions and Opinions, Was Inadmissible, Being Hearsay, Irrelevant and Prejudicial, and Invading the Province of the Jury. The Court of Appeals Erred in Approving Its Admissibility.

Hearsay evidence from this witness was admitted, over objection, and his testimony as to the failure of petitioner to answer his questionnaire was received, under the guise of conversations with petitioner. (R. 427, 429, 431, 434, 437, 438, 444).

The admission of evidence of this character constitutes reversible error.

Harrison v. United States, 200 F. 662, 673 (CCA 6)
Mattson v. United States, 7 F. 2d 427, 428 (CCA 8)
United States v. *Sprengel*, 103 F. 2d 876, 882, 883 (CCA 3)
Fotie v. *United States*, 137 F. 2d 831, 840 (CCA 8)
See also *Bolt* v. *United States*, 2 F. 2d 922, 923, 55 App. D.C. 120
Smith v. *United States*, 105 F. 2d 778, 779, 70 App. D.C. 255
McLendon v. *United States*, 13 F. 2d 777, 778
Coulston v. *United States*, 51 F. 2d 178, 182 (CCA 10)
Blandi v. *United States*, 259 F. 93
Steinberg v. *United States*, 14 F. 2d 564, 567 (CCA 2)

V

The action of the trial judge in the conduct of the trial was unreasonable and hostile, and highly prejudicial to petitioner. The Court of Appeals gave no consideration whatsoever to this point.

Fair trial and due process command that the trial judge maintain an attitude of unswerving impartiality.

Bollenbach v. *United States*, 326 U. S. 607, 612.
Starr v. *United States*, 153 U. S. 614, 626.
Adler v. *United States*, 182 F. 464, 472 (CCA 5).
Hunter v. *United States*, 62 F. 2d 217, 220 (CCA 5).
Egan v. *United States*, 52 App. D.C. 384, 397; 287 F. 958.
People v. *Godsey*, 334 Ill. 11, 17, 18.

The trial judge examined Government witnesses repeatedly, to bring out facts unfavorable to petitioner (R. 160, 214, 219, 222, 232, 256, 285, 294, 299, 353).

He told the prosecution he did not want it to jeopardize its record (R. 245).

He suppressed objections by the defense with adverse comment (R. 215, 682, 683).

He prevented adequate cross-examination of the witness who attempted to identify the books of account (R. 287, 288, 330, 333).

He charged defense counsel with improper motives in asking proper questions (R. 504).

He asked questions of witnesses which were irrelevant and prejudicial (R. 219, 222, 256).

He commented adversely on material defense evidence which he reluctantly permitted to be introduced (R. 683, 722, 815).

He excluded material evidence bearing on the question of intent, at times becoming violent in his rulings (R. 749).

Because one of counsel for the defense in final argument made the remark that "the search for the truth still fails", the judge grasped the opportunity to charge the jury to disregard all of the evidence theretofore admitted bearing upon the wrongful competitive interference with petitioner's business, exerted at the time when success seemed certain, evidence bearing upon the value of the assets, and other evidence material to the defense (R. 813, 815).

The individual and accumulative effect of the action and attitude of the trial judge deprived petitioner of a fair trial and due process.

Bollenbach v. *United States*, 326 U. S. 607, 612.

The court below abandoned its appellate function in failing to consider and pass upon this point.

VI

The court below erred in approving and even complimenting the final argument to the jury by counsel for the Government, in which improper, inflammatory and unsupported statements were made, by reason of which petitioner did not receive a fair trail.

In his final argument to the jury, the Assistant District Attorney said that petitioner was a member of a "bunch" which "duped" the investors (R. 791), and that, in effect, petitioner was a thief, a liar, a confidence man, and an old hand in the game, thus characterizing petitioner, without evidentiary support, as an habitual criminal (R. 792, 793).

He stated that petitioner and others "got away" with most of the investors' money, in spite of the fact that the Government's evidence disclosed that petitioner received only $51,000 for approximately three years of effort, which included business and transactions having no relation to the enterprise for which petitioner was indicted (R. 396, 515, 529).

The attempted apology by the prosecutor and the statement of the court to the jury with respect to one portion of this argument (R. 793) were inadequate and incorrect, and did not extract the virus from the minds of the jurors. This Court deems such arguments to be both consequential and prejudicial.

Berger v. *United States*, 295 U. S. 78, 88.
New York Central R. R. Co. v. *Johnson*, 279 U. S. 310.

To the same effect are many other decisions, including:

Beck v. *United States*, 33 F. 2d 107, 114 (CCA 8).
United States v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 661 (CCA 2) (dissenting opinion, Judge Frank).
O'Neill v. *State*, 189 Wis. 259, 207 N. W. 282.

VII

The Court of Appeals erred in approving the final charge to the jury

The opinion of the court below does not consider the specific points of objection made by petitioner, but, instead, selected three paragraphs from the charge consisting of general language bearing broadly on the subject of the burden of proof and the presumption of innocence (R. 893).

The comment of the court that on the whole the charge was not unfavorable is incomprehensibly interspersed between portions of the opinion dealing with the sufficiency of the indictment (R. 893-894).

The trial judge, throughout the charge, confused the substantive counts and the conspiracy count, calling the whole indictment a charge of conspiracy (R. 796-797, 803, 807).

It was not until he concluded his charge, and was reminded that he had not instructed on the conspiracy count, that he gave a general definition of conspiracy which was truly "unilluminating", without explaining or correcting

his previous indiscriminate references to all counts as charges of conspiracy (R. 841).

Under the instructions, it was impossible for the jury to come to an intelligent conclusion as to the separate charges in the several counts.

The court otherwise erroneously charged the jury, including the instruction as to "the scheme" (R. 801), the instruction as to misrepresentations (R. 804), the instruction as to the legal effect of the contracts with the customers (R. 812-813), and above all, that final portion of the charge which took from the jurors' consideration material evidence bearing upon intent, giving an excuse for such instruction a remark by one of counsel for the defense (R. 813-815).

This Court has held that error in instructions is not cured, as the court below seemed to think, "by a prior unexceptional and unilluminating abstract charge."

Bollenbach v. *United States,* 326 U. S. 607, 612.

The court refused to give an instruction as to the criminal responsibility of a principal for the acts of his agent (R. 827).

Coffin v. *United States,* 156 U. S. 432.
Beck v. *United States,* 33 F. 2d 107, 112 (CCA 8).
Barrett v. *United States,* 33 F. 2d 115, 116.
Van Tress v. *United States,* 292 F. 513, 516 (CCA 6).

The giving of an erroneous instruction cannot be regarded as harmless error.

Bihn v. *United States,* 328 U. S. 633, 638;
Kotteakos v. *United States,* 328 U. S. 750, 761, 764, 773;
Fiswick v. *United States,* 329 U. S. 211, 217.

VIII

There Was No Substantial Proof at the Close of All the Evidence Establishing the Material Allegations of the Indictment Against Petitioner. The Trial Court Erred in Refusing to Direct a Verdict of Not Guilty, and the Court Below Erred in Failing to Consider Petitioner's Contentions in Connection With This Point.

It is within the province of this Court, and it should accordingly exercise its supervisory powers, to say whether or not petitioner was entitled to have the court below consider if there was any substantial evidence upon which the judgment could be predicated.

There was complete failure of proof connecting petitioner with any of the alleged misrepresentations.

There was complete failure of proof, indeed the proof was to the contrary, as to the alleged lulling payments made to investors (R. 157, 171).

There was complete failure of proof as to any knowledge or approval by petitioner of any representation respecting the sale of Consolidated's Bernheim Whiskey as "I. W. Harper". The testimony of most Government witnesses in this respect was contrary to the charge of the indictment and contrary to the opinion of the court below (R. 892, 897).

The remarks of the Court of Appeals to the effect that there was some evidence that the use of one of the labels was unauthorized and fraudulent (R. 892) and its justification of the Government's argument on the ground that petitioner's product was deceptively branded (R. 897) *is not supported by a scintilla of evidence.*

The allegation as to the "secret profit" was refuted by the Government's principal witness Oldroyd (R. 93, 123).

The customer witnesses interrogated upon the subject testified that petitioner told them there was no guaranty as to any amount to be received (R. 183), that the transactions were speculations (R. 213), that the whiskey business was highly speculative (R. 182, 221, 224)—all contrary to the opinion of the court below which states, without foundation, that the profits "were alluring" (R. 892).

The Court of Appeals for the Seventh Circuit itself has held that, where there is no substantial evidence supporting the indictment, a verdict of not guilty should be directed, thereby indicating that it will and that it should, exercise its functions in examining the record for the purpose of ascertaining the presence or absence of necessary evidence.

Reuben v. *United States*, 86 F. 2d 464, 467 (C. C. A. 7).

It is universally held that where essential elements of criminal intent depend upon circumstantial evidence, then, unless there be substantial evidence excluding every hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused.

Paul v. *United States*, 79 F. 2d 561, 562-564 (C. C. A. 3);
Gargotta v. *United States*, 77 F. 2d 977, 981-984 (C. C. A. 8);
Nicola v. *United States*, 72 F. 2d 780, 781, 787 (C. C. A. 3);
Hammond v. *United States*, 127 F. 2d 752, 753, 75 U. S. App. D. C. 397;
Candler v. *United States*, 146 F. 2d 424, 426 (C. C. A. 5);
Beck v. *United States*, 33 F. 2d 107, 112 (C. C. A. 8).

IX

The Indictment in the Instant Case Is Fatally Defective and the Court Below Was in Error in Holding That it Sufficiently Stated a Criminal Cause of Action.

The court below was more concerned with the sufficiency of the motion to quash than with the sufficiency of the indictment (R. 893, 894).

The substantive counts did not plead the scheme under the requirements announced by this Court that every element of the offense must be alleged with reasonable particularity of time, place and circumstance.

United States v. *Cruikshank*, 92 U. S. 542, 558;
Evans v. *United States*, 153 U. S. 584, 587;
Pettibone v. *United States*, 148 U. S. 197, 202.

The indictment is defective, also, in its allegation of thirty-one different misrepresentations, seemingly the gravamen of the charge (and the jury was so instructed, R. 801, 803, 804, 811), without any word in the indictment as to the time, place or circumstances, when, where, how, or to whom, the representations were made.

Fontana v. *United States*, 262 F. 283, 286 (C. C. A. 8).

The conspiracy count, re-alleging and adopting the substantive counts, is subject to the same infirmities.

Blair, "The Judge-made Law of Conspiracy", 37 American Law Review 33;
Recommendations to District Judges, Judicial Conference of 1925;
U. S. v. *Britton*, 108 U. S. 199, 204;
Terry v. *United States*, 7 F. 2d 28, 30 (C. C. A. 9);
Symonette et al. v. *United States*, 47 F. 2d 686, 687 (C. C. A. 8).

Argument

I

The Exclusion of Relevant and Material Evidence Bearing on the Question of a Defendant's Intent in a Criminal Case Is Erroneous and Constitutes an Unfair Trial and a Denial of Due Process.

Instead of passing upon the relevancy and admissibility of evidence tendered by petitioner, bearing directly upon his intent, and upon the effect of its exclusion from the consideration of the jury, the Court below side-stepped this issue and concluded that the evidence in the record was sufficient to sustain the conviction. In this, as in other portions of the opinion, the Court ignored the repeated warnings of this Court that it is not for courts of appeal to spell out guilt from an entire record, but to ascertain whether or not error appears in the trial proceedings.

Bollenbach v. *U. S.*, 326 U. S. 607, 614.

If such error appears, then, according to the opinions of this Court, there is a presumption of harm, and it is the Government's duty to establish the harmlessness of the questioned procedural events. The lack of prejudice must affirmatively appear.

Bihn v. *United States,* 328 U. S. 633, 638;
Kotteakos v. *United States,* 328 U. S. 750, 761, 764, 773;
Fiswick v. *United States,* 329 U. S. 211, 217;
Bollenbach v. *United States,* 326 U. S. 607, 614.

The evidence in the case at bar disclosed that thousands of barrels of Bernheim whiskey and some Bardstown, a still older product, were purchased by the corporation over the eighteen months from the inception of the enterprise, with no purchases of younger whiskey and no trade

younger whiskey suggested to any customer. Thou-
ds of cases were bottled (R. 560, 561) and sold successfully
to October, 1940 (R. 566). It was not until November,
0 (the first transactions occurring in May, 1938 (R.
6)) that 550 barrels of younger whiskey as against 11,025
rels of aged whiskey appeared in the inventory (R. 323).
s fact alone contradicts the theory of the prosecution
the defendants, from the beginning, intended a scheme
templating the repeated trading of older for younger
ducts.

he evidence also showed that in the Spring of 1940 an
nsive campaign for the bottling and sale of Bernheim
skey, under Consolidated's own label, was undertaken,
sisting of advertisements in trade papers and brochures
other advertising pieces sent to thousands of dealers
oughout the United States (R. 535). The test campaign
successful (R. 540). Thousands of barrels were placed
ottling plants for bottling (R. 545, 763). Thousands of
les and cases were purchased (R. 545). Special labels
e designed and completed (R. 547). A special mold for
bottles was made (R. 545). A case goods salesman, for-
ly employed by the I. W. Harper Distributors, was em-
yed, and upwards of thirty case goods salesmen were
aged (R. 549). Three delivery trucks were purchased
550) and additional warehouse space for the warehous-
of the cases, rented (R. 545). These and other facts
e testified to by petitioner (R. 532-565) and others,
they stand uncontradicted.

he bottling and sale of Bernheim whiskey under Con-
dated labels was interrupted, and, after eighteen months,
trades for younger whiskey was suggested, with options
he customers, also undisputed, providing that the com-
y buy the whiskey owned by the customers outright
h no bottling contract, or for the customers to retain
t of their Bernheim whiskey, to be blended with current

production, or to trade the Bernheim whiskey for current production, to be carried for a future bottling program (F. 586). These new offers were made to between eighty and one hundred customers (R. 585) out of about three hundred fifty to four hundred customers who held bottling contracts (R. 514).

In view of these undisputed circumstances, the question was sharply presented—did the effort to bottle aged whiskey under the contracts with the customers, which up to October, 1940, was proceeding with increasing success (R. 744), fail because of a deliberate fraudulent intent or because of the impact of the efforts of others interested in bottling and selling Bernheim whiskey who were adversely affected by the defendants' activities? Under such a condition of the record the trial court, having in mind the presumption of innocence, should have been anxious that any evidence favorable to the defense be presented and admitted. To a limited extent, the Court was persuaded to admit a few bare circumstances touching upon the interference of others, but even this evidence was stricken in the charge to the jury, after final arguments by prosecution and defense.

The following are some of the evidentiary factors bearing upon the question of intent which were tendered and excluded:

> Evidence of the threat by the I. W. Harper Distributors to petitioner in the effort to prevent the further sale of bottled Bernheim by Consolidated (R. 566, 572, 573).
>
> Evidence of other actual and unjustified competitive interference by the I. W. Harper Distributors (R. 748, 751, 753).
>
> Evidence of the acts of Henry Klein in refusing to redeliver pledged warehouse receipts upon payment except with the endorsement "without recourse," a phrase inapplicable and unjustified and confusing to purchasers, and evidence of the effort of Klein to com-

pel the sale of the Bernheim whiskey to him by Consolidated (R. 607, 608, 613, 614, 771).

Evidence of Klein's connection with the purchaser at the sale in bankruptcy (R. 641).

Efforts of petitioner to enter into transactions which would insure the completion of the bottling contracts (R. 545 *et seq.*).

Evidence of an unfounded complaint lodged with the District Attorney's office by counsel for Schenley interests as to which petitioner offered to prove by the Assistant District Attorney in charge of the investigation that the entire subject matter of the complaint was baseless (R. 772).

Evidence of advice to petitioner by his counsel in the preparation of the bottling plans and contracts (R. 530).

Evidence in corroboration of petitioner as to his testimony with reference to his negotiations in attempting to bottle the Bernheim whiskey (R. 756).

Evidence as to the effect in the trade of the "without recourse" endorsement (R. 757).

Evidence of the Petition for Reorganization under Chapter X of the Bankruptcy Act (R. 640).

Evidence of petitioner's efforts to save the interests of the customers in the bankruptcy proceeding and to prevent a forced sale of the assets (R. 641).

Evidence that the investors received over 43 per cent of their claims as dividends from the sale of the corporate assets (R. 642).

The Court of Appeals did no more than touch upon the excluded evidence, except to mention briefly the coercive activities of competitors (R. 896). It allowed itself to be drawn away from the issue by the suggestion that a remark to the jury by the then counsel for petitioner, required or justified the last portion of the charge to the jury which withdrew from consideration all of the evidence of outside impacts upon the business, including such evidence as had been admitted and even discussing adversely the tendered

evidence which never got to the jury. Said the Court of Appeals "*Regardless of whether the evidence was receivable or not, the comment of counsel was entirely improper.*"

The non-sequitur nature of the Court's reasoning further appears in the opinion where the Court says that, "Petitioner's intentions *were better displayed* by his actions and particular dealings rather than by showing that he would have come out victorious with his competitors if they had not crushed him" (R. 896). The Court then went on to say that in determining his "guilt or innocence, his protestations of good intentions were entitled to weight," but the jury was required to weigh his actions and his conduct against his professed innocence and good faith (R. 896). Evidently the Court forgot that the jury was not permitted "to weigh" the evidence which the Court, in its opinion, speaks of as if it had been admitted.

While the Court below used the comparative "better displayed," it decided actually that evidence of intent may be "only displayed" by defendant's own acts. Some of these acts were petitioner's efforts to bottle and sell the product. But others of these acts were the acts of petitioner in his effort to overcome the vicious competition which did finally crush him. Certainly such excluded events were consistent with the hypothesis of innocence to the benefit of the consideration of which, by the jury, a defendant is always entitled.

Long ago this Court held that, while tendered testimony adverse to the theory of wilful and evil intent may not establish an absolute defense, it must, nevertheless, be submitted to the jury. *Potter* v. *U. S.*, 155 U. S. 438, 447. There the Court said, further:

> "As 'willful' wrong is of the essence of the accusation, testimony bearing directly upon the question of willfulness, is of vital importance, and error in reject-

ing it cannot be regarded otherwise than as material and manifestly prejudicial."

In *Miller et al.* v. *U. S.*, 120 F. 2d 968 (CCA 10) the Court said, at page 970:

> "Intent is an essential element of fraud (citing cases). Whenever the belief of a person or the motive of his act or conduct is material, he may not only directly testify that he had no intent to defraud, but he may buttress such statement with testimony of relevant circumstances, including conversations had with third persons or statements made by them, tending to support his statement that he had no intent to defraud."

The Court went on to say, at page 973:

> "There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for the reversal of the judgment."

See also *Buchanan* v. *U. S.*, 233 F. 257 (C. C. A. 8); *Hyde* v. *U. S.*, 15 F. 2d 816 (C. C. A. 4); *Sparks* v. *U. S.*, 241 F. 777 (C. C. A. 6).

In *Kleeden et al.* v. *U. S.*, 45 F. 2d 87, (C. C. A. 5), the gist of the case against the defendant as stated in the indictment and as presented to the jury and also in the final charge, was, as in the case at bar, that none of the sums of money received by the defendants from the sale of purported interests in oil leases was actually used in drilling wells but was appropriated to the defendants' private use. The Court said:

> "As the matter is left, however, by the ruling of the court, appellant was compelled to go to the jury without

any affirmative evidence as to his intent really not to appropriate the moneys to his own use as charged, but to develop the property, except his own statements of what he intended to do and the proof as to what had been done on the property up to the time of the arrest, only two weeks after the indictment letters were sent out.

"For the error in thus unduly limiting the testimony in a case where good faith was the paramount issue, the judgment of the court below must be reversed."

The action of the trial court in excluding evidence of innocent intent, and the blanket confirmation thereof by the court below, is believed to be unprecedented. Had the jury been advised of the excluded events, the verdict of guilty might not have been rendered. Had the jury been allowed to know that a 43 per cent dividend had been paid to investors, the United States Attorney could not have been heard to say, as he did, that "they (the customers) got a lot of serial numbers, they got a few pieces of paper" (R. 793).

There is one paragraph of the opinion which aptly demonstrates that the Court below did not understand the case presented to it for decision.

"If there be any serious question upon which the jury might ponder, it would be over the fact that the various individuals, called the victims, were speculators in the whiskey field, and were desirous of making large and quick profits through the conversion of their green or inferior whiskey into bottled whiskey and selling the same as a product deceptively branded or misrepresented to the buying public. Not all of the defendant's victims, however, were of this group, and we apprehend that the scheme to defraud was not strictly limited to defrauding the possessors of whiskey of this character but included the more innocent whiskey dealers, who no doubt were entitled to the protection along with the Government against frauds of this kind. At least the

> statute makes no distinction as to the persons whom it aims to protect because of the presence or absence of ethical ideals."

There is nothing in the case to justify this gratuitous observation,—nothing in the indictment, nothing in the evidence, and nothing in the contentions of either party. Yet in this language is the philosophy which caused the Court to brush off the serious questions raised by the judgment of the District Court and the proceedings out of which such judgment emerged.

It is urged that it is necessary for this Court to take and hear this case, and, ultimately order a new trial, when the boasted safeguards for accused persons may be regarded as something more than an ancient myth.

II

The Court of Appeals erred in dismissing petitioner's point that the trial court erred in denying the motion to require the prosecution to elect as to whether it would proceed on the substantive mail fraud counts or on the conspiracy count of the indictment.

This is a distinct conflict with other circuits upon this point. The court below dismissed petitioner's contentions in this respect as frivolous, without pausing to consider the identity of the actual offense described in the substantive mail fraud counts and in the conspiracy count, and the provability thereof by identical evidence. Reliance was placed by the Court of Appeals, rather unheedingly, upon *Heike* v. *United States*, 227 U. S. 131, where Mr. Justice Holmes said, at page 144, "The liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offense at which the conspiracy aims." In the *Heike* case, the indictment charged the *actual entry* of sugar into the United States by false representa-

tion of true weights, and also charged conspiracy to effect such entry. The substantive offense was the accomplishment of the fraud.

The distinction between that case and the case at bar, though seldom recognized, may be readily perceived. In the instant case the substantive counts charged a particular use of the mails in execution of a scheme to defraud—*not the accomplishment of such scheme.* Conviction could follow in a mail fraud case if two or more defendants schemed to defraud customers by false pretenses, and, thereafter, one wrote a letter to his associate discussing the unlawful plan. No customer need be even contacted because it is the unlawful intent in the contemplated enterprise which makes the overt use of the mails unlawful. The project may not pass beyond the mental contemplation of the defendants.

The statute, itself, reads, "Whoever, having devised, *or intending to devise,* any scheme or artifice to defraud * * * shall, for the purpose of executing such scheme or artifice, *or attempting so to do,* place or cause to be placed any letter, etc.," (Title 18, U. S. C. A. Sec. 338).

An indictment for violation of the Mail Fraud Statute has been said to be composed of two elements, (1) the scheme, and (2) the use of the mails, the first being called the "genesis" and the latter the "gist" of the offense. In itself, the mailed piece may be unobjectionable. It is the intended fraud which makes the use of the mails culpable. Essentially, both crimes are similar, the difference being in the reverse use of the language describing the offenses. In the one case the mailing is the fatal step which attempts to put the unlawful scheme into operation, while in the charge of conspiracy, the mailing is the overt act by which the parties start the conspiracy along its illegal road.

The conspiracy count in the indictment at bar charges the defendants with conspiracy "to commit divers offenses

against the United States, *that is to say, the offense of devising a scheme and artifice to defraud, and to obtain money and property by means of false pretenses, representations and promises, which scheme and false pretenses, representations and promises were described and set forth in the First Count of this indictment, which description of said scheme and artifice is incorporated herein by reference and made a part of this Count as though more fully set forth and described herein, and for the purpose of executing and attempting to execute said scheme and artifice to defraud and attempting so to do, to place and cause to be placed in the Post Office of the United States • • • certain letters, circulars, printed folders and other written materials alleged in Count One to Twenty-eight inclusive,"* (R. 63). Language could not have been more deliberately chosen to plead that the defendants conspired to conspire to use the mails in execution of a scheme to defraud. Viewed in the light of ordinary understanding, the language and structure of the conspiracy count is but a catch-all repetition of the preceding counts.

The same evidence tendered to prove the offense of conspiracy was used to prove the substantive offenses. Indeed, the trial court itself, during the trial and in its final charge, constantly confused the two offenses (R. 186, 796, 797, 807).

In *Freeman* v. *United States,* 146 F. 2d 978 (CCA 6), the Court, in speaking of the conviction of a defendant both under a substantive count and conspiracy count, said, at page 979:

> "Congress has the power to create separate and distinct offenses growing out of the same act, but whenever it appears *that the proof of one offense proves every essential element of another* growing out of the same act, the Fifth Amendment limits the punishment to a single act, *Gavieres* v. *United States,* 22 U. S. 338, 343, 31 S. Ct. 421; 55 L. Ed. 489." (Italics supplied)

The Court said, also:

> "There can be no doubt that the substantive offenses charged in the two counts required proof of joint action, just as it was required under the third count.
>
> "In the case of Krench v. United States, 6 Cir., 42 F. (2d) 354, defendant was indicted and convicted on three counts. The first charged the bringing of merchandise into the country in violation of the Tariff Act; the second, concealment of merchandise after it had been brought in, and third, the conspiracy to bring into the country the merchandise mentioned in the other counts.
>
> "We there said that proof of the conspiracy was ample, but it was clear that proof of the substantive offense included every element of the conspiracy, and that to impose a consecutive sentence on the third count was double punishment. The *Krench* case cannot be distinguished from the one at bar. *It is plain from the face of the present indictment that the substantive offenses charged in the first two counts include every element of the offense charged in the third count.*" (Italics supplied)

In *Hendrey v. United States,* 233 F. 5, 12 (CCA 6), the Court said that,

> "Indeed, the practice of joining a count for conspiracy with a count or counts against two or more persons for violating section 215, though common in some districts and though it has been judicially approved, does not seem to have been considered in the aspects that here arise, and will merit careful attention."

In a footnote to this opinion Judge Denison observes:

> "The writer of this opinion notes that, ordinarily there is no difficulty in conceiving the crime itself and the conspiracy to commit it, followed by some overt act, as two distinct offenses; but when we come to apply Section 215 to the case of two or more respondents, and remember that a 'scheme' planned by two or more people is a 'conspiracy', we find, from one aspect, a

conspiracy which is to be followed by a particular overt act, else the conspiracy is not wrongful; and we find, from the other aspect, the identical act pursuant to the identical conspiracy. Could joint respondents be acquitted for this act pursuant to this conspiracy, and then be subject to conviction for the same conspiracy materialized by the same act? The District Court met this difficulty by arresting judgment on the third count; but a doubt must arise whether Congress ever intended R. S. sec. 5440 (Criminal Code, Sec. 37) to apply to a conspiracy to conspire, or to a conspiracy which was already specifically punished, if followed by a certain event, and which, unless to be followed by that very event, did not contemplate any offense against federal law. When and how far the crime of conspiracy survives the commission of the substantive crime is also suggested."

The Second Circuit Court of Appeals in the *United States* v. *Mazzochi*, 75 F. 2d 497, said, *"we have repeatedly expressed our disapproval of accumulating sentences by verbal devices."* (Italics supplied).

That the offense here was duplicated or "accumulated," can hardly be gainsaid.

Proof under the substantive counts required evidence that the defendants "devised or attempted to devise" a scheme to defraud. Proof under the conspiracy count required evidence that the defendants "conspired" to devise a scheme to defraud. Proof under the substantive counts required evidence of mailing of a count letter. Such proof under the conspiracy count was required if the Government elected to prove the mailing as an overt act, *as the conspiracy count itself announces.*

When the Government rested its case on the substantive counts, it rested, also, on the same evidence on the conspiracy count.

In the recent case, *Sealfon* v. *United States*, 332 U. S. 575, decided January 5, 1948, this Court rendered an opinion

the essential doctrine of which is contrary to the conclusion of the Court below. While this Court said that it has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses, nevertheless, the Court went on to say:

> "But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (United States *v.* Oppenheimer, 242 U.S. 85, 87, 37 S. St. 68, 69, 61 L. Ed. 161, 3 L.R.A. 516; United States *v.* DeAngelo, 3 Cir., 138 F. 2d 466, 468; Harris *v.* State, 193 Ga. 109, 17 S.E. 2d 573, 147 A.L.R. 991; see Frank *v.* Mangum, 237 U. S. 309, 334, 35 S. Ct. 582, 590, 59 L. Ed. 969) and operates to conclude those matters in issue which the verdict determined though the offenses be different. See United States *v.* Adams, 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807.
>
> "Thus the only question in this case is whether the jury's verdict in the conspiracy was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. *This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial.* "* * * *The basic facts in each trial were identical.* As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could. *Thus the core of the prosecutor's case was in each case the same: the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices.*" (Italics supplied.)

It thus established that if a defendant be separately tried on a substantive count and later on a conspiracy count, and be successful in the first trial, then, *if the facts* are substantially the same, he may plead *res judicata* and thus prevent his submission for further conviction. The essence of

the Court's decision is evidently in the similarity of the facts. The logical pursuit of this doctrine, it would seem, must result in the confirmation of petitioner's position.

The propriety of the use of the conspiracy count as the procedural vehicle for the introduction of evidence to prove the substantive counts, where the latter are themselves largely, if not entirely, charges of conspiracy, should be finally determined by this Court.

III

The Court of Appeals Erred in Approving the Action of the Trial Court Admitting the Testimony of Government Accountants Who Attempted to Summarize Books of Account and Records Which Were Permitted to Be Introduced in Evidence Without Requisite Foundation.

Having attempted to prove the representations made to, and the contracts with, the investors, the Government next essayed to establish the falsity of the statements by oral summaries of the contents of portions of Consolidated's books and records. The negation is as important as the affirmation. While out of the possession of the corporation and petitioner, and, perhaps, while used by the trustee in bankruptcy, other entries were made in them. The admitted books and records consisted of ledgers, journals, records of warehouse receipts and barreled whiskeys, records of case goods, books recording the transactions respecting bottled and cased whiskey kept at the direction of the Government, and envelopes containing bills, invoices, and even correspondence.

In any true sense, no foundation at all was laid for the introduction of these exhibits, and yet the Court of Appeals dismissed petitioner's contentions in this respect in a short sentence, "There was no valid objection to their reception

(R. 897). Not a single witness testified in compliance with Sec. 695, Title 28, U.S.C.A., the relaxed statutory version of the shop-book rule.

Identification was attempted by Mildred Saunders, who had been employed by Consolidated only for the period from October 1940 to March 1941, six months out of the total of approximately three years of the corporation's activities. She was a discharged employee (R. 297). She testified that she worked on the bottling records only (R. 291), and upon those for a fraction of the total period involved. She knew nothing of the entries in any of the other exhibits as to any period of time. She said she knew nothing about what transpired after March 1941. The error of the trial court is apparent from its own language, "As I understand the testimony of the witness, *it is not intended to prove any entries in these books, but merely to prove they are the books of the corporation*" (R. 287, 288). The Court limited the cross-examination, saying that it "could not go into any entries of the books; merely to the question whether they are the books and records * * *." The Court said that the witness "could not know what happened after she left there of her own knowledge, anything entered in the books when she was not there. She could not know that" (R. 330). At another point the Court said, "*It does not make any difference whether this witness had knowledge of them or not*" (R. 302). In effect, the Court ruled that all of the questions directed to this witness in contemplation of Sec. 695, Title 28, U.S.C.A., were pointless (R. 330).

Some of the records were missing (R. 331, 778), and when the defense attempted to introduce the receipt signed by the trustee in bankruptcy showing what books and records had been delivered to him, the offer of proof was denied (R. 778).

The mistake of the district judge in admitting these exhibits without even the pretense of foundation, even under

the most liberalized view of the statute, cannot be excused under any theory of harmless error. If the books were improperly admitted, the testimony of the accountants based thereon was likewise improperly received, and, hence, an indispensable part of the Government's case is left unsupported. The language of the section is plain,

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter" (Title 28, U.S.C.A. Section 695).

In *Hoffman* v. *Palmer*, 129 F. 2d 976 (CCA 2) the Court held that it could find, neither in the statute nor in its legislative history, any Congressional attempt to eliminate the necessity of proving that the *entries* in such books of account were made *"in the regular course of business."* Those words, the Court said, "twice employed in the legislation, are not colloquial words but are words of art, with a long history * * * often theretofore judicially interpreted."

The Court said, at page 986:

> "No one knew better than the sponsors of the Model Act—men like Wigmore and Morgan—the traditional significance of 'regular course of business.' *There can be no doubt that their intention was to widen the exception to the hearsay rule relating to such writings. But it is equally without doubt that they did not intend to abolish the exception and to substitute another, by giving that phrase a meaning precisely opposite to that*

which they well knew was its recognized meaning. If that had been their intention, they would surely have said so, either in the language of the Act itself or in their Report, in order to avoid misleading the lawyers in the legislatures asked to enact that statute. There is nothing whatever in the Report of the Commonwealth Committee even faintly intimating any purpose completely to do away with every one of the traditional safeguards against a motive to misstate in statements made in 'the regular course of business.' Nor is there anything in any subsequent comments of any members of that Committee showing that they had any such intention.

And we cannot impute such an unusual intention to Congress. If that was what Congress meant to do, 'it would have been easy to say so.' It would have been still easier to have omitted altogether the historic words. We must assume that Congress used them deliberately with recognition of their history. And we must so interpret them. We have no right to be generous with other people's words."

Speaking of that portion of the section mentioning the circumstances as to the making of the writing, including lack of personal knowledge of the entrant or maker, as not affecting admissibility, the Court said at page 986:

"But they disclose no purpose to exterminate the inherent character of the exception, i.e., to remove *all* safeguards theretofore connoted by 'regular course of business.'"

A dissent was filed to Judge Frank's majority opinion in the *Hoffman* case (with which *dissent* the Court below evidently agrees), but the case was affirmed by this Court in an opinion by Mr. Justice Douglas, to which there was no dissent. *Palmer* v. *Hoffman*, 318 U. S. 109, 113-115.

See also *Hickman* v. *Taylor*, 329 U. S. 495, 91 L. Ed. 330, 343.

The effect of the decision below is that entries in books of account tendered by the prosecution in a criminal case, *need not appear* to have been made in the regular course of business, and that *it is unnecessary* to show that it was the regular course of such business to make such entry at the time of the transaction, occurrence or event, or within a reasonable time thereafter. The opinion does violence to the statute and to the ruling of this Court, and, the subject matter of the evidence being vital to the judgment of conviction, it follows that the decision of the Court of Appeals in this respect is erroneous.

IV

The Testimony of Post Office Inspector Sugg, as to His Investigations, Declarations, Conclusions and Opinions, Was Inadmissible, Being Hearsay, Irrelevant and Prejudicial and Invading the Province of the Jury. The Court of Appeals Erred in Approving Its Admissibility.

As its last clean-up witness the Government presented the testimony of V. V. Sugg, who, as a post office inspector, had been the chief investigator against petitioner and one of the principal figures in preparing and guiding the prosecution (R. 437, 438, 444). The trial court permitted the inspector to testify, over objection, that he had had occasion to investigate complaints against Consolidated (R. 429, 431, 432), to give his opinions and conclusions as to the ethics of the business (R. 430, 431), as to the failure of petitioner to answer a three-page questionnaire propounded by the Post Office Department, and as to his impressions and conclusions as to petitioner's intent and purpose (R. 434).

Justification of Sugg's testimony was attempted upon the theory that he was recounting, only, conversations which he had had with petitioner, but in these conversations he successfully got before the jury evidence which was purely

hearsay and utterly irrelevant, and which doubtless succeeded in disparaging the accused in the eyes of the jury.

That the admission of evidence of this character constitutes reversible error is established by many authorities.

In *Harrison* v. *United States*, 200 F. 662, 673 (CCA 6), it was held that the reading of a letter from an attorney for the Post Office Department, written in connection with an inquiry expressing the opinion, directly or by inference, that the business of defendant was fraudulent, was inadmissible as invading the province of the jury.

In *Mattson* v. *United States*, 7 F. 2d 427, 428 (CCA 8), it was held that the testimony of a Federal Prohibition Agent to the effect that he had received complaints from members of the public concerning the matter charged in the indictment "was clearly inadmissible and fatally prejudicial to the case of a defendant because it was bald hearsay or hearsay of hearsay."

In *United States* v. *Sprengel*, 103 F. 2d 876, 882 (CCA 3), a postal inspector, in charge of investigations of the Post Office Department, was permitted to testify in respect to the failure of defendants to answer questionnaires sent to them by the Post Office Department. On appeal, the Court ruled as follows (page 883):

> "A further question arises in respect to testimony given by Inspector Hawkesworth in respect to the failure of the appellants to answer the questionnaires sent to them and the comments of the prosecuting attorney upon this matter in his address to the jury. We think that this matter also constituted prejudicial error to the appellants. The law is well settled that a prosecuting attorney may not comment upon his failure to so testify. The question presented by this aspect of the case at bar is closely analogous. The appellants were not compelled by law to respond to the questionnaires of the Post Office Department and the fact that they did not do so does not present evidence that they acted

in bad faith or were not acting in good faith. *Boyd* v. *United States,* 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746; *McKnight* v. *United States,* 6 Cir., 115 F. 972."

In *Fotie* v. *United States,* 137 F. 2d 831, 840 (CCA 8), in which the defendant was charged with having represented himself as a United States citizen for the purpose of voting, the trial court admitted evidence of statements of Immigration Inspectors to the effect that the defendant was not a United States citizen. On appeal, this was held hearsay and inadmissible.

To the same effect are:

Bolt v. *United States* (CA DC) 2 F. 2d 922, 923, 55 App. DC 120;

Coulston v. *United States* (CCA 10), 51 F. 2d 178, 182;

Blandi v. *United States* (CCA 6), 259 F. 93;

Smith v. *United States* (CA DC), 105 F. 2d 778, 779; 70 App. DC 255;

McLendon v. *United States* (CCA 6), 13 F. 2d 777, 778;

Steinberg v. *United States* (CCA 2), 14 F. 2d 564, 567.

The action of the trial court in overruling petitioner's objection and his motion to strike this testimony constitutes prejudicial error which the court below incorrectly confirmed in its opinion.

V

The action of the trial judge in the conduct of the trial was unreasonable and hostile, and highly prejudicial to petitioner. The Court of Appeals gave no consideration whatsoever to this point.

Fair trial and the requirements of due process command that the judge presiding at a criminal trial maintain an attitude of unswerving impartiality. Sometimes defeated parties come to appellate courts with an instance or two of judicial conduct claimed to have been prejudicial, and

in many cases the higher courts have refused to reverse because of the failure to show prejudice. In the present record there are many judicial acts, each serious enough in itself, but all of them, in their necessary effect upon the jury, adding up to the conclusion that petitioner's right to a fair trial was grossly abused and denied. The requirements of brevity permit no more than the barest outline of the conduct of the trial judge throughout the trial.

The court suppressed objections with adverse comment (R. 215, 682-3). It took over, at many points, the examination of government witnesses to bring out facts unfavorable to the defendant (R. 160, 214, 219, 221, 222, 232, 256, 285, 294, 299, 353), and then, as to books and book entries, stopped cross-examination on the same subjects which the court's questions had covered. Cautionary words were expressed to the prosecution, stating in effect that the court did not want it to jeopardize its record (R. 245). Rules of evidence were flagrantly violated. Adequate cross-examination of the witness who attempted to identify the books of account was restricted (R. 287, 288, 330, 333), although the court attempted, by questions, phrased favorably to the prosecution, to cover the same subjects sought to be examined by the defense (R. 285, 299). The court charged defense counsel with improper motives in asking proper questions (R. 504).

Although the trial judge knew that the contracts between Consolidated and its customers did not contemplate the redelivery of warehouse receipts, he, nevertheless, repeatedly asked customer witnesses at the conclusion of their testimony if they had received any actual warehouse receipts. (See, for example, R. 219, 222, 256). When one government witness attempted to relate a conversation prefacing his testimony with the words "the story, of course, was etc." and defense counsel objected on the ground that the conversation itself should be related, the court snapped

"Don't interrupt, please, without a good objection" (R. 245).

The prosecution had read long documents in detail to the jury, but when, on defense, an exhibit was to be read the court said "Let him read each item. It doesn't make any difference" (R. 683). On the occasion when the court reluctantly permitted petitioner to testify that $650,000 was received from the sale of Consolidated's assets, the court destroyed the effect of the evidence by stating, in the presence of the jury, "I doubt if it is material, but if you want it in the record it may stand" (R. 722). Subsequently this important item of evidence was stricken in the final charge (R. 815).

The consistent exclusion and limitation of petitioner's effort to introduce evidence bearing upon his intent in the transactions under inquiry is, in itself, a conclusive indication of the attitude of the court. The right to produce a number of disinterested witnesses, all of whom would testify to meetings in which petitioner was advised of the action of the Schenley Distributors, although clearly in compliance with such cases as *Miller* v. *United States,* 120 F. 2d 968, 970, was denied (R. 776-777).

When an attempt was made to elicit the testimony of a witness as to his personal investigations of the harassing actions of the Schenley I. W. Harper Distributors, the court said that the witness' *personal investigations and* what he heard by hearsay were not material (R. 749). When counsel for another defendant then on trial, believing that the court had not perceived that the questions to the witness concerned personal knowledge and investigation, and not hearsay, and deferentially requested to make a statement to the court of his position, the judge seized an empty water glass and ordered counsel to sit down (R. 749).

Because the then counsel for petitioner made a remark to the effect that the "search for the truth still fails," the

judge seized the opportunity for a last word in his final charge to the jury, *striking all the evidence which had theretofore been admitted on the subject of outside interference with the bottling operations* and even stating to the jury reasons which had motivated him in excluding evidence which never got into the record (R. 813-815)

In this connection the words of Mr. Justice Frankfurter delivering the opinion of the court in *Bollenbach* v. *United States,* 326 U. S. 607, 612, are of particular significance:

> " 'The influence of the trial judge on the jury is necessarily and properly of great weight' *Starr* v. *United States,* 153 U. S. 614, 626, * * * and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

In *Gomila et al* v. *United States,* 146 F. 2d 372 (CCA 5), one of the errors assigned was:

> "That the court erred throughout the trial in unnecessarily taking an active part in the prosecution, by taking away the examination of witnesses from respective counsel who were properly conducting said examinations, and by questions and comments showing a hostile attitude toward defendants."

The court, quoting from *Adler* v. *United States,* 182 F. 464, 472 (CCA 5) said, at page 374:

> " '* * * The impartiality of the judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases. The importance and power of his office, and the theory and

rule requiring impartial conduct on his part, make his slightest action of great weight with the jury.' "

In *Hunter* v. *United States*, 62 F. 2d 217, 220 (CCA 5), the court said:

" '* * * It is the judge's duty to maintain an attitude of unswerving impartiality between the government and the accused, and he ought never in any questions he asks go beyond the point of seeing to it, in the interests of justice, that the case is fairly tried. We refer with entire approval to what Judge Shelby, speaking for this court long ago, said on this subject in *Adler* v. *United States*, 5 Cir., 182 F. 464. * * * It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial * * *.' "

See also *Egan* v. *United States*, 52 App. D.C. 384, 397, 287 F. 958; *People* v. *Godsey*, 334 Ill. 11, 17, 18.

No jury, composed of ordinary men and women, could fail to perceive and be influenced by the bias of the trial court. In the circumstances, fair trial to petitioner was an impossibility. The Court of Appeals erred in completely ignoring petitioner's contentions upon this phase of the controversy.

VI

The Court of Appeals erred in approving and complimenting the final argument to the jury by counsel for the Government in which improper, inflammatory and unsupported statements were made, by reason of which petitioner did not receive a fair trial.

In his final argument to the jury the Assistant District Attorney told the jury that petitioner was a member of a "bunch" which "duped" the investors (R. 791) and that

he was a thief, a liar, a confidence man, and "an old hand in the game", thus characterizing petitioner, utterly without justification, as, in effect, an habitual criminal (R. 792-793).

Speaking of the transactions of Consolidated and the acts of the defendants, counsel for the Government said (R. 792):

> "* * * That is thievery, plain simple thievery, and there is the man that did it right in front of you.
>
> "You people saw Mr. Freeman get on this stand. You also had a chance to see him duck and dodge things he didn't want to answer. Frequently his answers were 'I don't remember, it could be, if.' "

This statement of the prosecutor falsified the record, and, in view of petitioner's open acceptance, on the witness stand, of full responsibility for the management of the company (R. 645), the argument was a blow below the belt by a slugging prosecutor.

He continued (R. 792):

> "Ladies and gentlemen, we know that those are not the responses of a truthful man because a man that answers that way is hiding something, he is lying about something."

Subsequently in his argument, speaking of the fact that Consolidated had bottled bonded whiskey, had purchased trucks, run ads and "had a fancy office", he said (R. 792-3):

> "Well, I ask you, as a matter of fact, aren't those all the props that any good clever confidence man would set up to make this thing look like it was the real McCoy? Certainly.
>
> "They make the point that they paid some people; but we did not contend that they stole all the money they got their hands on. But I think the evidence shows they got away with most of it in one manner or another."

This was a violent misstatement in view of the fact that Freeman, according to the Government's evidence, received a total of $51,000 for approximately three years of effort (R. 396). It must be remembered, too, that the business of Consolidated included not only transactions under the bottling-power of attorney contracts, but, also, transactions with several hundred customers who dealt with Consolidated as ordinary purchasers with no bottling arrangement (R. 515), and the general brokerage business of buying and selling warehouse receipts, with other brokers, and purchasing whiskey for supplying rectifiers and taverns (R. 529). It should also be noted that, according to the Government accountants, every warehouse receipt was accounted for and every dollar of money taken in or paid out recorded. Indeed, much of the Government's case was predicated upon the truthfulness of the books of account.

Finally, counsel characterized the defendants as "old hands at the game" (R. 793). This characterization, coupled with the term "thieves" and "confidence men", left the jury to draw the inevitable conclusion that the defendants were old hands at defrauding the public as thieves and confidence men—in other words, they were habitual criminals.

Upon objection by counsel for the defense, the court mildly said:

> "That is not within the evidence. * * * The jury will disregard that *evidence.*" (R. 793)

Thereupon the prosecutor said: "I am sorry" (R. 793). It was too late to apologize. The harm had been done. No mild, and perhaps even no stern, rebuke could eliminate the effect of such an outburst from the minds of the jurors. "The virus is not so easily extracted."

This court has condemned bitter, passionate and insinuating attacks upon defendants by prosecutors in criminal cases.

In *Berger* v. *United States*, 295 U. S. 78, the court said, at page 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligations to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, *he is not at liberty to strike foul ones.*
>
> "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (Italics supplied)

In a leading case upon the subject, *O'Neill* v. *State*, 189 Wis. 259, 207 N.W. 282 (cited in a footnote to the dissenting opinion by Judge Jerome Frank in *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 643 (C. C. A. 2)), the court said:

> "When a prosecuting officer makes such statements as those here in question, no course is open to the court except to set aside the conviction. In arriving at this

conclusion the court has not overlooked the fact that the trial judge directed the jury to pay no attention to the remarks of counsel. Nor have we disregarded the well-established rule that the rights of a defendant may be protected by a prompt, vigorous and sharp reprimand of the trial judge coupled with an instruction to the jury to disregard the prejudicial remark. But even if such ruling might correct the error committed in this case, (which may well be doubted), it is clear that the mild and rather indecisive ruling of the trial court in this case did not meet the requirement of the rule. . . . Zeal in the prosecution of offenders is always to be commended. The zeal and the fidelity with which they perform their duty will determine in large measure the degree of protection which organized society gives its individual members. But the district attorney who permits his zeal to secure conviction, to cause him to disregard his duty as a 'sworn minister of justice' not only wrongs the defendant, he impedes the administration of criminal justice and brings the administration of the criminal law into disrepute."

See also *New York Central R. R. Co.* v. *Johnson*, 279 U. S. 310, 318; *Beck* v. *United States*, 33 F. 2d 107, 114 (C. C. A. 8).

The somewhat humorous but observant dissenting opinion by Judge Frank in *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631, 661, is worth reading. Noting that other circuits reverse on the ground, alone, of inflammatory and unjustified remarks of prosecutors, Judge Frank said, as to his own circuit:

"This Court has several times used vigorous language in denouncing Government counsel for such conduct as that of the United States Attorney here, but, each time, it is said, that, nevertheless, it would not reverse. * * * Such an attitude of helpless piety is, I think, undesirable. * * * If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. * * * The deprecatory words we use in our opinion on such occasions are purely cere-

> monial. Government counsel, employing such tactics, are the kind who, eager to win victories, will gladly pay the small price of a ritualistic verbal spanking. The practice of this Court—recalling the bitter tears shed by the walrus as he ate the oyster—breeds a deplorably cynical attitude toward the judiciary."

The opinion of the Court below upon this point is contrary to the opinion of other circuits and is a distinct lowering of the standards set by this Court for the conduct of public prosecutors.

VII

The Court of Appeals erred in approving the final charge to the jury.

The cursory opinion of the Court below on the subject of the final charge to the jury does not begin to consider the specific points of objection made by petitioner to portions of the instructions. After a paragraph describing the indictment and the motion to quash (without coming to any conclusion thereon), the Court launches immediately into the subject of the final charge. The court's comment is "on the whole, it was not unfavorable to the defendants" (R. 893). The court then quotes three paragraphs from the final charge on the subject of the burden of proof and reasonable doubt, to which no objection had been made by petitioner, and evidently comes to the conclusion that these paragraphs validated the entire charge.

After the last quoted paragraph from the instructions, the court, in its opinion, incomprehensibly, adds the language, in the ensuing paragraph, "In the absence of any specific criticism of the indictment we hold that the indictment was sufficient to state a cause of action" (R. 894). The very structure of the opinion is a demonstration that adequate consideration was not given to petitioner's presentation in the Court of Appeals.

This Court has said that error in instructions "is not cured by a prior unexceptional and unilluminating abstract charge." *Bollenbach* v. *United States*, 326 U. S. 607, 612.

Petitioner pointed out to the Court of Appeals the confusion in the instructions as to the substantive mail fraud counts and the conspiracy count. The court below was advised as to the failure of the trial judge to instruct on the conspiracy count (R. 796-797, 803, 807), until his attention was called to the omission, when a really unilluminating instruction was given defining "conspiracy" (R. 841).

Theretofore in the charge, the court, *speaking of the entire indictment*, said that it "charges that the defendants formed a conspiracy" (R. 796-797), and in the same sentence the defendants were referred to as "members of said alleged conspiracy" (R. 797). The court, after repeatedly referring to the investors as "victims" (R. 803), and still speaking of all of the counts, said, "Conspiracies are seldom, if ever, proved by the direct testimony of witnesses and they need not be so proved." And further, "If the facts and circumstances and all the evidence in the case convince you beyond a reasonable doubt *that it was a conspiracy as charged in the indictment*, then it is your duty as jurors to so find by your verdict (R. 807). This language referred to all of the counts. In the belated definition of conspiracy, the language previously used, indiscriminately referring to all of the counts of the indictment as a charge of conspiracy, was not corrected or explained, and, accordingly, the jurors finally retired to consider their verdict with instructions as to conspiracy referable to the substantive counts, and a conspiracy definition which could well be applied to both the conspiracy and the substantive counts. Under the circumstances it was impossible for the jurors to render a separate and intelligent verdict on the separate charges.

The court, moreover, advised the jury that "the scheme denounced by the statute includes everything designed to defraud by representation as to past or present, or suggestions or promises for the future (R. 801). The court then charged the jury that it was not necessary for them to find all of the misrepresentations alleged to have been made were in fact made, or that all of the several means or methods alleged were used. The court said that "proof of one or more is sufficient" (R. 804). The court thus advised the jury that if they believed any one of the 31 representations alleged (R. 6-12) had been made, a verdict of guilty should be returned. The court failed, moreover, to give the requested instruction to the effect that a defendant may not be held criminally responsible unless he knew what the agent was doing and promising (R. 827).

The jurors were further confused by the court's charge that the legal effect of the contracts with the customers was to impose no obligation whatsoever upon Consolidated (R. 812), and that the customers received "no enforceable or definable promise" (R. 812-813). Thereafter, the court instantly went on to state that the power of attorney constituted Consolidated the agent for the customer and proceeded to announce the fiduciary character of that relationship and its enforceability (R. 813).

As has been said, the trial court, in the course of the proceedings, had admitted certain stringently limited evidence bearing on petitioner's intent in the conduct of the business, showing the threat by counsel for the Schenley Bernheim Distillery, the acts of the Alcohol Tax Unit initiated by the Bernheim Distributors and the interfering tactics of Henry Klein, and had admitted the fact that the assets of the corporation had sold for over $650,000. Such was the record when both sides rested. The argument to the jury for petitioner had been made in the light of these facts, and

in the belief that evidence admitted would remain in the record. The action of the court not only destroyed the argument, it condemned petitioner.

Evidently inflamed by a remark of petitioner's then counsel, which the trial judge said indicated that he had been unfair, the judge proceeded to exclude from the jury's consideration all of the evidence of the Schenley-Bernheim and Klein interference and all of the evidence of the result of the sale of Consolidated's assets in bankruptcy (R. 813-815).

Without opportunity to present an argument as to the court's new ruling on the evidence, which appeared for the first time in the last words of the court to the jury, petitioner stood helpless. No one familiar with the trial of cases and the reaction of juries could come to any other conclusion than that the court, in this portion of the charge, directed a verdict of guilty.

VIII

There was no substantial proof, at the close of all of the evidence, establishing the material allegations of the indictment against petitioner. The trial court erred in refusing to direct a verdict of not guilty, and the court below erred in failing to consider petitioner's contentions made in connection with this point.

While this Court will not ordinarily consider any contention made upon the facts, in cases brought to its attention, the Court will notice and consider the propriety or impropriety of the failure or refusal of the Appellate Court to consider the question as to whether or not there was any substantial evidence in the record sustaining the judgment from which the appeal is taken.

It is within the province of this Court, and it should accordingly exercise its supervisory powers, to say whether

or not the court below was right or wrong in omitting to consider this point which, in the instant case, exhibits an outstanding example of the failure of the Government's case against an accused.

The indictment at bar required proof of fraudulent intent on petitioner's part to devise a scheme to obtain money and property by false pretenses. The evidence not only failed to prove, but disproved, that petitioner committed any of the acts constituting essential parts of the charge. There is no criminality in the first three paragraphs of the indictment.

Paragraph four alleges the intention to defraud by means of false representations, which are also the subject of paragraph five (R. 5), and further charges that in order to lull the persons to be defrauded into a sense of security, the defendants would remit returns on investments falsely held out to be advances on the proceeds of bottling and sale of the customer's whiskey. The only evidence of such payments is in the testimony of James B. Dunn, who said that he "borrowed" $200.00 from the company (R. 157), and of George H. Wells, who said that he "borrowed" $300.00 from the company (R. 171). This allegation was, accordingly, disproved.

Paragraph five of the indictment lists thirty-one misrepresentations (R. 6-12). There is not a scintilla of evidence connecting petitioner with any of them. Instead the Government's proof relieved petitioner from the charge of making, authorizing or ratifying false statements. As to the representations respecting the "I. W. Harper" label, the witness Oldroyd, while testifying that petitioner had mentioned that about forty per cent of the whiskey would be bottled under that label (R. 127), the customer witnesses who testified, *and who were called on by Oldroyd,* refuted this charge.

Kendall (R. 149) said no label was mentioned.

Dunn (R. 153) said nothing about it.

Wells said he knew the whiskey was to be bottled as "Old Switch," a Consolidated label (R. 182).

Mrs. Jackson (R. 189) did not mention the subject.

Mrs. Fitch said she did not remember whether petitioner told her that the whiskey would be bottled as "Old Switch," but she knew that was to be the label (R. 123).

Empson (R. 214) made no claim as to any such representation.

Ladd (R. 237) testified as to no such representation.

Snider was shown "Old Switch" labels and displays (R. 265).

Mrs. Snider said she was told the whiskey would be bottled as "Old Switch" and that thereafter it would be bottled as "I. W. Harper," an obvious confusion in the mind of the witness (R. 275).

As to the so-called secret profit, Government witness Oldroyd testified that petitioner told him that the trades were to be made not on an even barrel to barrel basis as alleged in the indictment (R. 10), but would be based on the then prevailing market price (R. 93, 123).

A number of Government witnesses otherwise refuted the case for the prosecution. Wells said that on several occasions petitioner told him there was no guarantee as to any amount to be received (R. 183). Mrs. Fitch said that petitioner told her the transaction was a speculation (R. 213). The evidence showed the petitioner told witnesses that the whiskey business was highly speculative and the price received would be governed by conditions (R. 182). One of the witnesses received more than the contract contemplated because the whiskey when sold brought a higher price (R. 195). As to still another customer, when it was shown that he misunderstood his transaction, he was restored to his original position voluntarily by petitioner

(R. 221). Rode said that petitioner told him his transactions were a "gamble" (R. 224) and also advised him as to the cost of bottling (R. 225).

It is significant that the defendants who actually contacted the customers were not found guilty by the jury.

Contrasting the record with the indictment, it will be seen that there was no evidence that the delay in the bottling program was not first caused by the on-coming new tax and the unsound stocking-up by buyers. There is no evidence that the whisky owned by the customers and traded for Bernheim was not inferior or contained a low grade co-operage. There is no evidence that it was not economically sound to seek a wider market by creating blends containing younger whiskey. There is no evidence that the subsequent delays in bottling were not due to outside impacts and to circumstances beyond petitioner's control. There is no evidence that the Bernheim whiskey bottled as "Old Switch" was not the full equal to that bottled as "I. W. Harper." There was no evidence that Consolidated did not own a large quantity of Bernheim whiskey. There is no evidence that it did not have orders for bottled whiskey. There is evidence that thousands of cases of aged whiskey were bottled. There is no evidence of any "lulling" payments.

There was no attempt to prove a great majority of the charges of false pretenses.

The remaining charging paragraph of the indictment, Six (R. 12), alleged that the defendants converted the property of the customers obtained by false pretenses. As to this, the Government's evidence showed that every barrel was evidenced and recorded by correct serial number and assigned to the customer entitled thereto, and there is not a single instance of any false or duplicate warehouse receipts (R. 343). The admitted amount received by petitioner, $51,000.00 out of the business of the company, in-

cluding transactions which constituted no part of the alleged scheme, contradicts the charge of conversion.

There was no rebuttal by the Government of the evidence submitted in defense.

The Court of Appeals for the Seventh Circuit has itself held that where there is no substantial evidence supporting the indictment, a verdict of not guilty should de directed. Thereby indicating that it will examine the record for the purpose of ascertaining the presence or absence of necessary evidence.

Reuben v. *United States,* 86 F. 2d 464, 467 (CCA 7).

It has been held in many cases where the essential elements of criminal intent depend upon circumstantial evidence, then, unless there be substantial evidence which excluded every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused. Some courts have held that where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the reviewing court to reverse the judgment against the defendant.

Paul v. *United States,* 79 F. 2d 561, 562-564, (CCA 3).
Gargotta v. *United States,* 77 F. 2d 977, 981-984, (CCA 8).
Nicola v. *United States,* 72 F. 2d 780, 781-787 (CCA 3).
Hammond v. *United States,* 127 F. 2d 752, 753, (CCA DC), 75 U. S. App. 2 C 397.
Candler v. *United States,* 146 F. 2d 424, 426, (CCA 5).
Beck v. *United States,* 33 F. 2d 107, 112, (CCA 8).

The trial court refused to give a tendered instruction to the jury in line with the foregoing decisions (R. 837).

This Court, in the exercise of its corrective powers, should announce that Courts of Appeal, in reviewing cases brought to its attention, may not fail or refuse to pass upon the pres-

ence or absence of substantial evidence when the question is presented by an appellant who supports his position by the record.

IX

The Indictment in the Instant Case is Fatally Defective, and the Court Below Was in Error in Holding That it Sufficiently Stated a Criminal Cause of Action.

In its opinion the court below said that "in the absence of any specific criticism of an indictment we hold that the indictment was sufficient to state a cause of action" (R. 894). The court was more concerned with the sufficiency of the motion to quash than it was with the indictment itself, as is evident from the fact that it quotes certain isolated paragraphs from the motion, which take a whole page of the opinion. The court's statement as to the absence of specific criticism is entirely unfounded.

The substantive counts charging particular uses of the mails plead the scheme in furtherance of which the mails were used. The minimal requirement of pleading commands that the scheme be charged with particularity requisite to apprise the court of the offense and to enable the accused to acquaint himself with what he will be required to meet on the trial.

This Court has repeatedly held that "every element of which the offense is composed must be accurately and clearly alleged," and that "a crime is made up of acts and intent," all of which must be set forth in the indictment with reasonable particularity of time, place and circumstances. *United States* v. *Cruikshank et al.*, 92 U. S. 542, 558.

The rule announced in *Evans* v. *United States*, 153 U. S. 584, is:

> " 'A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States v.*

> *Mills,* 32 U. S. 7 Pet. 138 (8:636), that an indictment for a statutory misdemeanor is sufficient, if the offense be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States v. Carll,* 105 U. S. 611 (26:1135), "fully, directly, and expressly, without any uncertainty or ambiguity, set forth *all the elements necessary to constitute the offense* intended to be punished." The crime must be charged *with precision and certainty,* and *every ingredient of which it is composed must be accurately and clearly alleged. United States v. Cook,* 84 U. S. 17 Wall. 174 (21:533); *United States* v. *Cruikshank,* 92 U. S. 542, 558 (23:588, 593)' " (Italics supplied).

In *Pettibone* v. *United States,* 148 U. S. 197, 202, the court said:

> "Every particular of the scheme must be directly and positively averred."

The indictment gives rise to a number of questions. Exactly what was the scheme to defraud? At one point of the indictment (Par. 4, R. 5) it is charged that the scheme was that the defendants would induce persons to be defrauded by representations as to "greater profits, etc.". At another point it is alleged that the defendants purposed to exchange powers of attorneys originally signed for others which deferred the time of bottling, an allegation which seems to indicate delay in performance rather than conversion. It is impossible to ascertain from the instrument what the illegal intent is supposed to be.

Paragraph 5 of the indictment (R. 6) alleges thirty-one misrepresentations. If the indictment means what it says, that the scheme was devised "for obtaining money or property by fraud and false pretenses" (R. 3), then these specifications of false pretenses constitute the gravamen of the charge. This was the accepted theory of the

Court during the trial (R. 186). The charge to the jury leaves no doubt that the court believed the indictment to state a case of the devising of a scheme to defraud by means of false pretenses (R. 811, 801, 803, 804). The judge stated the question for the jury in the following language:

> "Whether there was a scheme for obtaining money or property by means of false or fraudulent representations or promises within the scope of the charges laid in the indictment, is a question of fact for you to determine" (R. 803).

The evidence introduced by the government, largely that of customer witnesses, demonstrates that the alleged false pretenses constituted the essence if not the whole of the scheme.

In not one of the thirty-one specifications of false representations is there any word in the indictment of the time, place or circumstance as to when, where, how, or to whom the representations were made.

In *Fontana* v. *United States*, 262 F. 283 (CCA 8), the court said at page 286:

> " 'If the pleader had set forth in this indictment any fact or facts, such as the time, place, occasion, circumstances, persons present, or any other distinctive earmark whereby the defendant could have found out or identified the occasion or occasions when the government intended to attempt to prove that the defendant uttered any of the nine sayings charged, he might have been able to investigate the basis of the charges, to learn who were or were not present on the occasions referred to, hence who were possible witnesses, and to prepare his defense; but there is nothing of that kind in the indictment. As it reads, he might have been called to meet on each of the nine charges testimony that at any time of day or night, at any place in New Salem, on any occasion, public or private, before the indictment was filed, and after the Espionage Act was passed on June

15, 1917, he had uttered to any one whomsoever any of the statements charged in the indictment. These considerations compel the conclusion that this pleading signally failed to state the facts which the government claimed constituted the alleged offense in this case, so distinctly as to give the defendant a fair opportunity to prepare his defense to meet any of them, and that he could not and did not have that notice of them required to give him a fair trial."

See also *Beck* v. *United States*, 33 F. 2d 107, 110 (CCA 8).

Adapting this language to the instant indictment, it is clear that, under its language, the defendants might be called upon to meet, on each of the thirty-one charges, testimony that at any time of the day or night and at any place and on any occasion, one or more of the defendants uttered to anyone whomsoever any of the statements charged in the indictment.

The conspiracy count, taking over, as it does, the allegations of the preceding substantive counts, is subject to the same infirmities. The label "conspiracy" is not a passport to the region of harmless error. Conspiracy counts, injected into almost every Federal indictment, have been recognized to be the cause of abuse and injustice. Blair, in an article in 37 American Law Review 33 entitled "The Judge-Made Law of Conspiracy," says:

> "* * * it has become in recent years quite the fashion in this country, where two or more are suspect of some crime, for public prosecutors to have them indicted for conspiracy. The courts have made it delightfully easy to secure a conviction, by relaxing the rules of pleading and enlarging the scope of testimony. Thus a great mass of decisions has accumulated, each court apparently vying with all the others to make new law, until now almost any sort of an agreement may be styled a conspiracy; any indictment containing the magic words 'combined and conspired * * *

> makes a good indictment and any * * * evidence will prove the crime.' * * *"

See also *Terry* v. *United States*, 7 F. 2d 28, 30 (C. C. A. 9); *Symonette et al.* v. *United States*, 47 F. 2d 686, 687 (C. C. A. 8); *United States* v. *Britton*, 108 U. S. 199, 204; Recommendations to District Judges by the Chief Justice of the United States and Senior Circuit Judges, Judicial Conference of 1925.

The conspiracy count in the instant case is but an attempt to bring together in one charge all of the allegations of the preceding counts. There is not a single essential difference between the allegations of the first twenty-eight counts and the twenty-ninth, which is the conspiracy charge.

All this was pointed out to the Court of Appeals, which, nevertheless, stated there was an absence of specific criticism, and that the indictment was without fault. It is respectfully suggested that the spreading area of liberality in the treatment of indictments for serious offenses, with its vanishing boundaries, be resurveyed by this Court, and some lines marked out beyond which prosecutors cannot go.

Conclusion

Petitioner recognizes that review by this Court is a high privilege, granted or withheld in the Court's discretion. It is realized that many such applications are attempted which do not involve principles or problems of national or general importance in the administration of justice. The present case involves the liberty of a single citizen, but it involves, also, a trial and a review so full of error, and of error of such a nature, that, unless this Court exercises its power of review, a citizen will have lost his liberty without due process in either the trial or Appellate Court, and the liberty of other citizens will be endangered by an unjust and uncorrected judicial precedent.

It is prayed that the petition for the writ of certiorari be granted.

Respectfully submitted,

THEODORE E. REIN,
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FRANCIS C. BROOKE,
Counsel for Petitioner.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, A. D. 1948

No. 873

MARK A. FREEMAN, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent*

To the United States Circuit Court of Appeals, for the Seventh Circuit

Statement of the Case.

The first twenty-eight counts of the indictment charged specific violations of the mail fraud statute (Criminal Code Sec. 215; Tit. 18 U. S. C. A. Sec. 338).

Count One (R. 2) charged the defendants with devising a scheme to defraud and for obtaining money and property by false pretenses from a class of persons desirous of making profitable investments in contracts for the purchase, bottling and sale of whiskey, the purchases to be evidenced by whiskey warehouse receipts, and the bottling contracts by written agreements and powers of attorney, as well as oral agreements. Many of such persons are alleged as being the owners of whiskey warehouse receipts. The scheme is described in the indictment as follows (R. 4):

1. The defendants, about December 31, 1938, established an office in Chicago, under the name of Consolidated Associates, Inc., a corporation, (hereinafter usually called "Consolidated") which was managed and controlled by the defendants;

2. The defendants would * represent to the investors and to the public that the corporation was engaged in the business of bottling and selling whiskey;

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* The indictment uses the phrase "would and did."

2a. The corporation obtained the names and addresses of owners of whiskey warehouse receipts;

3. The defendants would solicit from such owners warehouse receipts held by them, and would induce others to purchase warehouse receipts, and induced all of such persons to surrender their receipts for bottling contracts, oral and written, and written powers of attorney with the corporation, whereby the whiskey represented by the receipts was to be bottled and sold and the proceeds remitted to the investors after deducting $1.50 a case for commission, and deducting taxes and other expenses;

4. The defendants would induce these investors to be defrauded by false representations and promises as to greater profits, market conditions, and general demand for different types of whiskey, to surrender their receipts for bottling contracts and powers of attorney, and to exchange for powers of attorney originally signed by the investors, other powers of attorney which deferred the time of bottling one or more years beyond the date specified in the original powers of attorney; that it was part of the scheme that the defendants, to lull the investors into a sense of security, would remit to some, small returns on their investments, which were falsely held out as advances upon the profits of the bottling and sale of whiskey;

5. The scheme contemplated that the defendants, by means of advertisements, circulars and letters deposited and sent through the United States mails, and by means of oral communications by the defendants and their representatives, for the purpose of inducing the investors to purchase whiskey warehouse receipts and to enter into bottling contracts and powers of attorney, would make certain false representations.

Thirty-one specific misrepresentations are alleged as having been made, these charges being labeled "a to z" inclusive, and "aa to ee" inclusive, (R. 6-11). The charges of false representations, each of which is coupled with a negation, are, in part, as follows: That Consolidated owned a large bottling plant; that it was a licensed bottler and recti-

fier of whiskey, and that it was an old established bottling company operating under the supervision of the Federal Government; that the receipts surrendered to the corporation would be exchanged for a different brand of whiskey of equal value, which would be bottled and sold after four years from the date of distillation, but that the receipts so surrendered were immediately sold or hypothecated and the proceeds converted to the use of the defendants, no whiskey of a different brand, of equal value, being bottled and sold by Consolidated after four years from the date of distillation; that Consolidated had been bottling whiskey for holders of warehouse receipts for many years at a profit; that it was a large and financially sound corporation, bottling and rectifying on contract for several large distillers and users of whiskey; that the holders of the powers of attorney would realize large profits from the sale of whiskey in bottle form; that the corporation could manipulate whiskey prices and control the market; that it owned two distilling companies; that the powers of attorney would merely extend the time for bottling; that the investor's account would be credited with a larger number of barrels of whiskey than were actually credited; that the company owned the selling rights to a label known as "Old Switch," the retail selling price of which was the same as I. W. Harper whiskey, a well known brand; that the product bottled and sold by the company possessed an equal market demand with I. W. Harper whiskey; that the company was unable to bottle the whiskey originally owned by the investors because it was cloudy or smoky or damaged by floods, or because of the overage (outage) meaning loss of the content of barrels while standing; that a better plan had been developed for the customer than the original plan in that the company owned a large quantity of Bernheim whiskey which the corporation would exchange with owners of miscellaneous brands at an agreed ratio of one barrel Bernheim to three of the miscellaneous brands; that the Bernheim product owned by the company was free of encumbrances; that the customer's whiskey would be bottled under the "I. W. Harper" label; that no profit would be made other than the $1.50 a case; that the exchange with the customers was on a dollar for dollar basis, no profit accruing to the

company; that the company would and did make reasonable efforts to bottle and sell the customer's whiskey; that under a Government requirement, the corporation was required to debit certain amounts on the accounts of its customers, but were not actual debits owing to the corporation, but were intended to consist of accounts receivable from the investors; that the corporation had received definite orders for green and young whiskies in case lots, and that if the customers exchanged their powers of attorney relating to Bernheim whiskey for others evidencing younger whiskey, the customers would receive a substantial profit within a short time, whereas no such orders had been received and it was not intended to remit any moneys to said customers within a short or any other period of time.

The indictment then alleges (Par. 6, R. 12) that the defendants, having devised the scheme, did convert to their own use the money and other property obtained from the investors.

It is finally alleged (Par. 7, R. 12) that on December 4, 1940, at Chicago, Illinois, the defendants, for the purpose of executing the scheme, placed in the Post Office of the United States, to be sent and delivered by mail, a letter to one of the investors which is set out in haec verba and which is an acknowledgment of the receipt of an order covering the purchase of certain barrels of whiskey.

All of the succeeding substantive Counts of the indictment incorporate by reference the allegations of Count One, and charge other specific instances of mailing.

Count Twenty-nine (R. 62) also incorporates the allegations of Count One and charges that the defendants conspired to commit the offense of devising the scheme to defraud and to obtain money by false pretenses, "which scheme and false pretenses * * * are described and set forth in the First Count of this indictment, which description of said scheme and artifice is incorporated herein by reference and made a part of this Count," and, "for the purpose of executing and attempting to execute said scheme * * * to place and cause to be placed in the Post Office of the United States, to be sent and delivered * * * certain letters, circulars and printed folders, and

other written materials alleged in Counts One to Twenty-eight, inclusive."

The conspiracy Count further charges that in pursuance of the unlawful combination and to effect its object, the defendants made the false representations and caused to be placed in the Post Office of the United States the letters, circulars and primted folders, "all as charged and alleged in Counts One to Twenty-eight, inclusive, herein preceding this Count, by means and in the manner set forth in each of these Counts" ((R. 63).

The overt acts are alleged as being "the acts set forth in the preceding twenty-eight Counts of this indictment on the dates and in the manner therein set forth," all of which is incorporated herein by reference as though fully set forth and made a part hereof. The specific overt act charged against petitioner is that he had a conversation with one Charles S. Rode at Chicago, Illinois (R. 64).

None of the other defendants on trial, charged as conspirators, was convicted.

The motion to quash the indictment (R. 67-71) was overruled and the cause proceeded to trial on February 19, 1946, the trial concluding with the verdict of the jury on March 2, 1946.

The conspiracy count, being on its face an exact duplication of the substantive counts, and obviously provable by identical evidence, a motion was made to require the Government to elect whether it would proceed on the substantive counts or the conspiracy count (R. 74). The Court reserved ruling, and when the motion was renewed at the close of the Government's case, it was denied (R. 450).

At the outset, this Court should be advised that this is not a case involving false or duplicate warehouse receipts, or the theft or conversion thereof by any of the defendants named in the indictment. Every payment and every barrel and bottle of whiskey was accurately accounted for, according to the Government's evidence. Consolidated Associates, Inc., the transactions of which constituted the subject matter of the prosecution, held thousands of barrels of whiskey and thousands of cases of bottled whiskey, far exceeding in value the amount for which warehouse receipts for barreled whiskey has been pledged. Petitioner

voluntarily took the company, with all of its assets and records, into the Federal Court for reorganization under Chapter X of the Bankruptcy Act, and, this effort failing, the whiskey, in barrels and in bottles, was sold under the auctioneer's hammer, in bankruptcy, for about $650,000. The fact of the payment of dividends to the investors and the amount thereof, was excluded from the jury's consideration.

Consolidated was an Illinois corporation organized in December, 1938 (R. 74). Petitioner became its president, and, with Herman Garfield (a defendant who died before trial) managed the company. The business of dealing in warehouse receipts and bottling and selling whiskey, was the result of an examination by petitioner of the economic conditions of the whiskey market as they existed in 1938. Petitioner learned that the price of receipts for whiskey manufactured prior to 1937 was low, due to an over-production in 1936. Moreover, many smaller distilleries had sprung up after prohibition and had financed their operations by the sale of receipts to public investors. Another factor contributing to the low price was the inferior quality of the whiskey and the cooperage (R. 459). An accurate check was made by Freeman with the Department of Commerce and the Federal Alcohol Administration and banks, each of which kept accurate monthly data as to the production of distilled spirits (R. 474). At the time of the commencement of Consolidated's operations, it was believed there were approximately 250,000 barrels of whiskey in the hands of such public investors (R. 494).

The general plan of the company was to acquire warehouse receipts in the hands of investors, who, because unlicensed, could do nothing with the whiskey represented by the receipts except to resell them or cause them to be bottled by a concern authorized to do such work, which would require endorsement and delivery of the receipts and the payment of the heavy warehouse charges and taxes. The first method of operation may be termed the "conditional trade acceptance and bottling contract" plan, evidenced by Freeman's Exhibits 3 and 45, which, for the convenience of the Court, appear in full in the Appendix.

Fewer than one hundred transactions occurred under this method of operation (R. 501). Representatives of Consolidated called on the investors, and, as the result of these calls, conditional trade acceptances and accompanying bottling contracts were issued upon delivery to Consolidated of the investor's warehouse receipts. These receipts included between twenty and thirty makes of whiskey of lesser known brands (R. 503, 505).

Various practical problems then presented themselves. Each separate make or brand required a separate label on the back of the bottle. Whiskey represented by the miscellaneous receipts was of varying proofs and quality, which created an obstacle to any general advertising and selling campaign (R. 506). Moreover, the Securities and Exchange Commission advised Consolidated that the conditional trade acceptances might be construed as securities (R. 507). All of the trade acceptance transactions were cancelled except in two or three instances (R. 94).

A new plan was then formulated, which may be designated as the "Power of Attorney" plan. Petitioner ascertained (R. 507) that there was a large quantity of Bernheim whiskey in the hands of wholesalers and rectifiers available for purchase. Late in June 1939, the Power of Attorney plan, contemplating the bottling of Bernheim whiskey, was formulated and the conditional trade acceptance method of doing business abandoned. Evidence of the advice and assistance of counsel in this connection was excluded (R. 530).

This new plan possessed four phases: (1) to rescind the trade acceptances and give back the warehouse receipts, (2) to bottle out the whiskey if the owner desired under a power of attorney, but cancelling the conditional trade acceptances, (3) the exchange with the investor of the whiskey represented by their original warehouse receipts for Bernheim warehouse receipts, and (4) the acceptance of the Bernheim whiskey so exchanged for bottling under a power of attorney (R. 514).

The power of attorney and bottling contract are evidenced by Government's Exhibit 222, which appears in full in the Appendix.

During the course of its existence, Consolidated had a total of from 550 to 600 customers, some 350 or 400 of whom

held whiskeys under the new bottling contracts (R. 514). All other customers dealt with Consolidated as ordinary purchasers, with no bottling arrangement (R. 515). Consolidated was also engaged in the general brokerage business dealing in warehouse receipts, buying and selling as a broker with brokers, and purchasing whiskey of particular runs from supplying concerns who desired to bottle under their own labels (R. 529).

Consolidated promptly qualified and registered its whiskey and received liquor licenses in various states under regulations of state liquor control commissions (R. 532), and in September 1939, it applied for a wholesaler's basic permit, which was issued in November 1939 (R. 532-533).

Only whiskey which has attained the age of at least four years in barrels and in bonded warehouses can be bottled in bond (R. 476). The first customer whiskey available for bottling would not be ready until July 1940 (R. 541). In the Spring of 1940, in preparation for the bottling and sale on a wide scale of the investors' whiskey, advertisements of bottled Bernheim, under the name "Old Switch", a label owned by Consolidated, were placed in all important trade journals (R. 535), including full page advertisements (R. 538). A complete brochure was prepared and sent to some five or ten thousand wholesalers and liquor dealers throughout the United States (R. 535). Other advertisements, to the extent of about 40,000 pieces, were sent to every tavern, club and hotel in Illinois (R. 536). Pasters and stickers were distributed in tens of thousands, and thousands of advertising blotters and millions of matches were distributed throughout the United States to all types of dealers, stores, taverns, hotels and other places (R. 536-537).

A test campaign was then conducted for the actual sale of Bernheim whiskey as "Old Switch." Consolidated, in an effort to "sample the market" hired salesmen and promptly distributed about two hundred cases. The effort was successful, and repeat orders came in (R. 540).

In June 1940 warehouse receipts for July 1936 distillations were delivered to Lawrence Warehousing Company in Chicago, under an arrangement for bottling, pursuant to which the Lawrence Warehouse was to bottle 1,000 barrels.

There were no changes or liens on this whiskey, the only tax at that time being the Kentucky production tax of 5 cents a gallon (R. 541). The whiskey in barrels arrived in Chicago not later than July 1940 (R. 541).

Meanwhile, various necessary forms were prepared and arrangements made with the Louisville warehouse to check the serial numbers of the barrels, because particular serial numbers belonged to specific individuals and it was necessary to distinguish the accounts. Delivery trucks were purchased, additional warehouse space rented, a special mold was made for the bottle, and a sales force engaged. Thousands of cases of empty bottles were purchased (R. 545).

In September 1940 one Tennenbaum was employed as case goods manager. He was former sales manager for distributors of Schenley products (Schenley having acquired the Bernheim distillery and being engaged in the bottling and sale of Bernheim whiskey under the label "I. W. Harper"). He engaged about thirty salesmen to sell Consolidated's bottled Bernheim under its own label. The three trucks purchased were put into actual operation (R. 550). A window trimmer was employed for window displays (R. 558) photographs of some of which were introduced in evidence (R. 551, 552).

Consolidated did not bottle until September 1940 because of the increase in Government tax which went into effect July 1, 1940. The anticipation of the new tax caused the buying, before July 1, of great quantities of whiskey in case lots, as the result of which the market fell apart. This was one of the most important reasons why distillers and bottlers stopped the bottling of whiskey in 1940 (R. 544). The whiskey was successfully sold in case lots up to October, 1940 (R. 566).

At this point the defense proposed to show the interference by Schenley and its I. W. Harper distributors with Consolidated's sale of Bernheim whiskey under its own label. Before the middle of October, 1940, petitioner had a conversation with the attorney for the Bernheim Distillery (then a subsidiary of Schenley), at the attorney's office. He was not permitted to relate the actual conversation, being

allowed to state only its barest outline (R. 572). Petitioner testified that the gist of the conversation was that the Schenley I. W. Harper distributors resented the use of Bernheim whiskey under Consolidated's label "Old Switch", counsel stating that they would do what they could to prevent Consolidated's distribution. He offered to buy all of the Bernheim whiskey owned or controlled by Consolidated, together with labels, empty bottles, etc. Petitioner refused to consider the proposition and walked out (R. 572-573).

A full offer of proof was made as to this conversation (R. 568). Finally, after the argument to the jury, even the limited and inadequate statement of the gist of the conversation was wiped out by the Court in its final instructions to the jury (R. 815).

It was thereafter that investigation was made into the availability and marketability of younger whiskeys (R. 573). Consolidated acquired current production of whiskey of this nature for future operations and in order to manufacture a blended whiskey. *This was in the fall of 1940, more than one year after the first Bernheim transaction, and eighteen months after the original conditional trade acceptance transaction. It was not until November 1940 that 550 barrels of younger whiskey appeared in the inventory of Consolidated as against 11,025 barrels of aged whiskey—according to Government accountants* (R. 323). This controlling fact, completely at variance with the indictment (R. 5) was not noticed by the Court of Appeals.

New offers involving the younger whiskeys were made to between eighty and one hundred of Consolidated's customers (R. 585), the transactions suggested being either the outright purchase of the warehouse receipts from the customers without any bottling contract, or for the customers to keep part of their Bernheim whiskey and use current production for blending, or to dispose of the customers Bernheim whiskey and carry it for a bottling program four years thereafter (R. 586).

The interference in the marketing of Consolidated's product was discussed at weekly meetings of the case goods salesmen and the sales manager, Tennenbaum, at which

petitioner was present. The only testimony on this subject allowed by the trial court was that the substance of the meetings was that in the meetings the interference by the I. W. Harper distributors and the Alcohol Tax Unit men was discussed (R. 589). Even this limited evidence was eliminated from the jury's consideration in the final instructions (R. 815). Consolidated then employed one Salinger of the General Export Company, to contact liquor control commissions in the various states throughout the nation to find a market other than the Chicago territory (R. 591). Seventeen states were visited (R. 592, 738-740). In December, 1940, Consolidated lost all of its case goods salesmen due to the sales resistance created by the outside interference (R. 592).

In the course of its business, Consolidated purchased large quantities of Bernheim whiskey from Henry Klein, or his companies (R. 593-597). By March 1941, the company had about 6,000 barrels of Bernheim whiskey, some held outright, some in the hands of brokers, and some pledged with banks (R. 598). All of the indebtedness thereon secured by warehouse receipts was consolidated in a single loan from Klein on a company note, personally guaranteed by petitioner, in the sum of $211,000. All of the proceeds of the loan were put into the business of the corporation (R. 599). This loan was steadily reduced to approximately $166,000, when Consolidated had on hand about 5,000 barrels of Bernheim whiskey (R. 604).

Petitioner made various attempts to enter into transactions by means of which the whiskey could be bottled and sold and the customers contracts performed (R. 603, 604, 606, 607). Klein, himself, attempted to buy the whiskey in bulk, but petitioner insisted that the whiskey must be bottled (R. 606). Klein stated to petitioner that petitioner would be unable to sell the whiskey in the United States because the warehouse receipts held by him as security would be endorsed "without recourse", which would becloud the title (R. 607). Klein had transferred the receipts held as security into the names of two of his companies (R. 607). Other attempts to complete transactions, enabling the whiskey to be bottled and the customers contracts per-

formed, were thwarted by Klein's actions (R. 608, 609). After Schenley attempted to purchase the whiskey (R. 610), Klein made a further offer, but he would accept it only in bulk and not in bottles as petitioner insisted (R. 614). Petitioner and his counsel went to Klein and demanded that the receipts be delivered, upon payment, on the original terms and without the "without recourse" endorsement. Klein refused (R. 615).

All of this evidence, admitted during the course of the trial, was stricken from consideration by the jury in the final instructions (R. 815).

Consolidated's petition for reorganization under Chapter X of the Bankruptcy Act, was offered but excluded, the trial court stating that the defense would be allowed to prove only the adjudication in bankruptcy and the appointment of the trustee (R. 638, 640), and yet told the jury that Consolidated went into bankruptcy because it couldn't pay its debts (R. 815).

An offer of proof was made to the effect that the assets were turned over to the trustee pursuant to court order, that proceedings took place before a special master during which petitioner requested that the whiskey be not sold, but held to bring an increased price (which it subsequently did achieve) (R. 641-642); that petitioner objected to the sale upon the ground that the whiskey belonged to the customers; that after forced sale, distributions were made to creditors which, after the payment of all fees, costs and charges in bankruptcy, amounted to about 45 per cent (R. 641-642). The offer of proof was denied (R. 643).

Notwithstanding the evidence and the offer of proof, the Court below makes the facetious remark that "the record warrants the observation that these individuals (the investors) are still waiting" (R. 893).

The Government, by various witnesses, attempted to prove the contacts with, and the representations to, the customers by representatives of Consolidated. The customer witnesses, in practically every instance, failed to testify as to any material portion of the thirty-one misrepresentations alleged in the indictment by salesmen, *and there is a complete absence of proof of knowledge or author-*

ity on the part of petitioner as to the representations which were made to customers. These witnesses were Oldroyd (R. 85), Kendall (R. 145), Dunn (R. 153), Wells (R. 168), Jackson (R. 189), Fitch (R. 208), Empson (R. 214), Rode (R. 222), Bongart (R. 233), Ladd (R. 237), Schauf (R. 239), Ziebarth (R. 252, 260), Snider (R. 263), Sandor (R. 269). As to the typical cases selected for presentation to the Court of Appeals, (Ziebarth, Schauf and Dunn), Ziebarth and Dunn both refuted the charge of misrepresentation as to the label under which the whiskey was to be bottled, and as to the so-called concealed debit balance.

In all of the many letters written by petitioner to customers and introduced in evidence as Government exhibits, there is not a single misrepresentation or even exaggeration. It is to be noted that, although the charge of false pretenses is perhaps the gravamen of the indictment (R. 5-12) and so treated by the Court in the final instructions to the jury (R. 803), and although the point was sharply raised both as to the validity of the indictment and the sufficiency of the proof, the opinion of the Court below is virtually silent on the subject.

Following the testimony of the customer witnesses, the Government offered and the Court received in evidence Consolidated's books and records consisting of twenty-nine exhibits, including ledgers, journals, records of warehouse receipts, case goods and even loose sheets of paper and envelopes containing bills, invoices and correspondence (R. 281-284).

To lay the foundation for their admission in evidence, the Government called only one Mildred Saunders, who was employed by the company for a period of about six months, between October 1940 and March 1941 (R. 281), and who, while employed, worked upon only two of the books which related to bottling (R. 299). Although the trial Court, itself, observed that the witness could not testify as to anything concerning the books when she was not there (R. 330) and said, during the cross-examination of this witness, "You are asking her if she knows what happened when she was not there. Obviously she does not, you know that • • • there is no point to the question." Nevertheless the books were admitted in evidence. The Court said the

witness' testimony "*is not intended to prove any entries in these books,* but merely to prove that they are the books of the corporation" (R. 287-288). Upon these books and records the testimony of the Government's accountants was received, notwithstanding the fact that there was no evidence whatsoever that the entries were made in the regular course of business at the time of the event, or within a reasonable time thereafter, as required by Section 695, Tit. 28, U. S. C. A.

The Court below dismissed the argument in this connection with the single sentence, "There was no valid objection to their reception," (R. 897).

It appeared from the Government's evidence that when Consolidated ceased doing business, it had a total indebtedness of $340,207.72 (R. 318), while the assets of the company sold under forced sale in bankruptcy, brought $650,000 (R. 721). It appeared also that 19,908 barrels of whiskey were acquired from brokers, of which 11,669 barrels were paid for in full (R. 312). During the total period covering the events in question, petitioner received for all of his services, approximately $51,000 (R. 396).

The last witness called by the Government was V. V. Sugg, a post office inspector (R. 427), who testified, over objection, of complaints being filed and of his investigation during which he had four conversations with petitioner. In the course of these conversations, he was permitted to relate the substance of the complaints made to him by three or four customers, together with his impressions, opinions and conclusions as to petitioner's intent (R. 434).

All of the evidence tendered by petitioner showing outside interference as the cause of the interruption of the bottling program, rather than any intent not to perform the obligations of the corporation, was first limited and minimized by the rulings of the trial Court, and finally eliminated from consideration by the jury on the ground that counsel for petitioner had made an improper remark indicating that the Court was not giving a fair trial to the defense (R. 813-815). This is true as to the testimony of petitioner and of the witnesses, Tennenbaum (R. 742), Goodman (R. 453), Todes (R. 765), Prince (R. 769), and Gerber (R. 772). The latter witness for the defense was

a former assistant United States attorney, who had been assigned to investigate a complaint received from the attorney for Schenley's subsidiary, Bernheim Distilleries, charging that Consolidated's whiskey sold as "Old Switch", was not the same as "I. W. Harper", that there was a general resemblance between the labels and that Consolidated salesmen had told customers to undersell I. W. Harper whiskey. Petitioner offered to prove by Gerber that each of these complaints was investigated by the United States attorney *and proved to be unfounded.* The trial Court refused to permit the introduction of the testimony.

All of this goes unnoticed in the opinion of the Court of Appeals.

In its opinion the Court below states that Consolidated made use of two blends which were favorably known and extensively used, and that there was some evidence that one of the labels was unauthorized and its use fraudulent. *There is no such evidence.*

During the course of the trial the Court frequently suppressed objections made by defense counsel with unnecessary adverse comment (R. 215, 682-683). It took over at many points the examination of Government witnesses to bring out facts unfavorable to the defense, and then stopped cross-examination on the same subjects which the Court's questions had covered (R. 160, 214, 219, 222, 232, 256, 285, 294, 299, 353). The judge told counsel for the prosecution that he did not want them to "jeopardize" their record (R. 245). Complete cross-examination of the witness who attempted to identify the books of account was restricted (R. 504). At one point the Court refused to permit suggestions to be made in support of a principle of evidence, grasping a water glass and shouting to counsel to "sit down" (R. 749). At another point the Court charged defense counsel with an indirect method of testifying (R. 138).

Although the Court knew that under the contracts with investors the warehouse receipts were not to be delivered or redelivered to them, it, nevertheless, repeatedly asked customer witnesses if they had received any actual warehouse receipts (R. 219, 222, 256). On another occasion when a defense exhibit was about to be read to the jury, the Court said, "Let him read each item. It does not make any dif-

ference," (R. 683). When the testimony as to the receipt of $650,000 from the sale of Consolidated assets was received (which was later stricken in the final instructions after argument), the judge said he doubted if it was material (R. 722). He said that petitioner when testifying on the witness stand, was making, or about to make "a long speech" (R. 504, 543). The hostility of the Court was finally demonstrated in the instructions to the jury, in the last portion of which he erased all of the evidence as to outside interference with the bottling project (R. 813-815). This hostility manifested itself even after the trial. When counsel for the Government and petitioner sought an agreed order to permit the consolidation of the designations of the record for appeal, the Court exclaimed, "This case bears every evidence of someone sleeping in weeds with a lead pipe, waiting for a chance to take a crack at the trial judge" (R. 885). The opinion of the Court below completely ignores all of petitioner's contentions in this respect.

In his concluding argument to the jury, the assistant United States Attorney said that one of the Government witnesses "was duped with the rest of these people by this bunch," (R. 791). He said that the action of petitioner was "thievery, plain simple thievery," (R. 792). He said that petitioner, in his testimony, "ducked and dodged," which was not the fact. He called petitioner a liar (R. 792), a confidence man (R. 793). He said he "did not contend that they (the defendants) stole all the money they got their hands on," but that "they got away with most of it." He called the defendants "old hands at the game," although there was no hint of evidence justifying the remark (R. 793).

The Court of Appeals, quoting only the least offensive of the remarks by Government counsel, sanctions, in its opinion, all of this harangue to the jury. As to the sentence, "They were old hands at the game," the Court of Appeals said that this "might not be supported by the evidence." But the Court went on to say, "As to such evidence, we think it existed" (R. 898). There was no such evidence in the record and the speculation of imagination as to its existence outside the record is highly improper.

Many objections were made to the final instructions to the jury, and a complete presentation of the subject was made to the Court of Appeals, including the confusion in the instructions as to the mail fraud statute and the conspiracy statute, and the failure to instruct on the conspiracy count (R. 796-797, 803, 807), the repeated use of the word "victims" in the instructions (R. 803), the singling out of evidence for unfavorable comment, the statement to the effect that proof of one or more of the misrepresentations was sufficient (R. 804) without cautioning the jury that knowledge of or authority to make such representation was chargeable to petitioner, and the striking from the consideration of the jury of all of the evidence of competitive interference, the actual and final result to the investors and the statement to the jury that the I. W. Harper trade mark controversy, although advanced by the prosecution, had been "thrust" upon the jury by the defense (R. 815).

The Court below, beginning its discussion *with a description of the indictment,* then selected three paragraphs of "unexceptioned but unilluminating" instructions on the matter of the burden of proof and proof beyond a reasonable doubt, favorably commenting thereon and concluding therefrom that the instructions on the whole were "not unfavorable to the defendants," (R. 893). Immediately thereafter the Court, somewhat strangely, goes back to the indictment with the brief statement that in the absence of any specific criticism, it was sufficient to state a cause of action (R. 894).

(Here follows 4 Photolithographs)

CONSOLIDATED ASSOCIATES, INC.
620 N. Michigan Ave.
Chicago, Illinois

CONDITIONAL
TRADE ACCEPTANCE

CANCELLED

No._____

Date_____ ( ) Iden. ( ) Rec'd.

Government's Exhibit _____ Defendant's Exhibit V

In the District Court of the United States, for the Northern District of Illinois

Kas_____ Official Court Reporter

Pay to
The Order Of_____

The Sum
Of_____ Dollars ($_____)

A Due and payable on_____ days notice after_____ by Acceptor to Drawer

The transaction which gives rise to this instrument is the purchase of _____ barrels of _____ whiskey which the Acceptor is authorized to bottle and sell. The amount of this Acceptance is computed to allow the Acceptor a net service charge of not less than one and one-half ($1.50) dollars per case of the bottled goods and is subject to revision and readjustment to assure such payment in accordance with the terms of Contract No._____ between the payee and the Acceptor of even date herewith and subject to which this instrument is given. This conditional trade acceptance is payable at the offices of the Acceptor or any Bank. This Acceptance is conditional and must be presented for acceptance.

CONSOLIDATED ASSOCIATES, INC.
B

SELLER-(DRAWER)

ACCEPTOR

Appendix 95

The conditional Trade Acceptance referred to herein will be delivered to Seller upon receipt by Buyer of Warehouse Receipts covering Whiskey in bond at its offices at Chicago, Illinois. If the conditional Trade Acceptance is not received by Seller within ten (10) days from the date hereof Seller should advise Consolidated Associates, Inc., at once.

ORIGINAL CONTRACT

CONSOLIDATED ASSOCIATES, INC.

620 North Michigan Avenue
Chicago, Illinois
Phone Delaware 5515

_____ of the City of _____

in the State of _____ hereinafter called the SELLER and CONSOLIDATED ASSOCIATES, INC., an Illinois Corporation, hereinafter called the BUYER, contract and agree by and between themselves unto the following:

First: That in consideration of the services and advances of monies to be rendered and caused to be made by BUYER, SELLER hereby sells, assigns and delivers to BUYER Warehouse Receipts for Whiskey-In-Bond for _____ barrels, described and itemized on the reverse side hereof.

Second: That title and property of these Warehouse Receipts for Whiskey-In-Bond to pass to BUYER upon delivery to BUYER from SELLER and execution of this contract.

Third: That SELLER expressly authorizes and directs BUYER to bottle or cause to be bottled the whiskey represented by such Warehouse Receipts at such times as BUYER may deem necessary and to cause Warehouse Receipts to be issued therefor.

Fourth: That BUYER intends to affect the bottling of said whiskey and to offer the bottled goods for sale after the whiskey represented by the Warehouse Receipts herein described has been aged for a minimum period of four (4) years from date of distillation.

Fifth: That the purchase price to be paid to SELLER by BUYER shall be equivalent to the amount which BUYER receives from the sale of said bottled goods, less all taxes, insurance and expenses advanced or incurred by BUYER in connection with the withdrawal of the whiskey from Storage, Transportation, Bottling, Stamping, Labelling, Financing and costs of resale and one and one-half ($1.50) dollars per case, representing BUYER'S charges which is in payment of services and sales organization costs. .

Sixth: That in the interim BUYER will deliver to SELLER within ten (10) days from date hereof a conditional Trade Acceptance for an amount computed at average current market prices for such bottled goods, after having made allowance for BUYER'S charges and estimated taxes and expenses as aforesaid; however, same shall be subject to revision and adjustment after the bottled goods are sold to reflect the actual purchase price as fixed herein.

Seventh: That BUYER will exhibit invoices to SELLER, showing the actual price received for the bottled goods sold or caused to be sold by BUYER for the account of SELLER.

Eighth: That SELLER vouches himself to be the true and lawful owner of the said goods with full right and authority to dispose of the same in the manner aforesaid and further agrees to warrant and defend the said goods to the said BUYER against all claims and demands.

Ninth: That SELLER hereby expressly authorizes BUYER to pledge or hypothecate said Warehouse Receipts, the said whiskey or bottled goods or Warehouse Receipts therefor for payment of the charges and expenses hereinabove set forth which charges shall be paid before the sale thereof. In the event market conditions prevent the sale of said bottled goods within the time specified or a reasonable time thereafter, BUYER reserves the right to deliver to SELLER as payment in full of the conditional Trade Acceptance delivered to SELLER, Warehouse Receipts representing the said bottled goods subject to the costs, charges and expenses herein referred to. The BUYER likewise reserves the right to make such readjustments as to price and to sell said bottled goods at such prices as BUYER may deem necessary.

Tenth: That this contract contains the entire agreement of the parties hereto and SELLER agrees that no representations were made other than those herein set forth.

This contract is executed in duplicate, copies of which have been duly received by each of the parties hereto and receipt of which is hereby acknowledged, and entered into at Chicago, Illinois, on _____, 19____

_____ (Seal)

_____ Address

_____ City and State

CONSOLIDATED ASSOCIATES, INC.,

By _____

CANCELLED

Exhibit 3 Defendants
554
In the District Court of the United States for the Northern District of Illinois

ORIGINAL

CABLE ADDRESS: CONSAS, CHICAGO

TELEPHONE: DELAWARE 3513

CONSOLIDATED ASSOCIATES, INC.

Wholesale Liquor Distributors

620 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS

E 7288

Know all men by these presents . . .

that the "Undersigned" _____ of the

City of _____ State of _____

for and in consideration for the services and advances of money to be rendered by the CONSOLIDATED ASSOCIATES, INC., an Illinois corporation, hereinafter called "Agent" and in further consideration of the services and advances of money to be rendered and costs to be incurred by said Agent, and also in consideration of One Dollar ($1.00) and other good and valuable considerations this day in hand paid by the said Agent to the Undersigned, receipt of which is hereby acknowledged, the Undersigned does hereby appoint the said CONSOLIDATED ASSOCIATES, INC., an Illinois corporation, as its true and lawful attorney, and in his name:

ONE: The Undersigned does hereby deposit with the Agent Negotiable Warehouse Receipts for Whiskey-in-Bond for _____ barrels manufactured by _____ Distillery in the _____ of 19____ in the manner and for the purposes hereinafter set forth.

TWO: The Undersigned authorizes and directs the said Agent to cause to be bottled the Whiskey represented by such Warehouse Receipts at such time or times as the Agent may deem necessary or advisable and to cause Warehouse Receipts to be issued therefor. The Agent intends to cause the bottling of said Whiskey and to offer said bottled goods for sale after the Whiskey represented by the Warehouse Receipts herein described has been aged for a period of four (4) years from date of distillation.

THREE: The Agent shall use his best efforts to procure for the undersigned a purchaser or purchasers for the said bottled goods at the then prevailing prices, and the amount to be paid to the Undersigned shall be equivalent to the amount which the Agent receives from the sale of said bottled goods, less all taxes, insurance and expenses advanced or incurred by the Agent in connection with the withdrawal of the Whiskey from storage, transportation, bottling, stamping, labeling, financing, selling commissions, and one and one-half dollars ($1.50) per case payment for the Agent's services.

FOUR: The Undersigned hereby expressly authorizes the Agent to pledge or hypothecate said Warehouse Receipts, the said Whiskey or bottled goods or Warehouse Receipts therefor for payment of all charges and expenses hereinabefore set forth, which charges shall be paid before the sale thereof. In the event conditions prevent the sale of said bottled goods within a reasonable time after the bottling thereof, the Agent reserves the right to deliver or cause to be delivered to the Undersigned the Warehouse Receipts representing the said bottled goods, subject to all costs, charges and expenses referred to in paragraph THREE.

FIVE: The Agent shall receive payment for said bottled goods from the buyer or buyers thereof and shall make such assignments or agreements concerning the said Warehouse Receipts enumerated herein or the Warehouse Receipts for such bottled goods as and when the same are issued or for the Whiskey represented thereby as said Agent may deem necessary. The Agent shall make, execute and deliver receipts for any and all payments received by virtue of the exercise of this Power of Attorney. The Agent shall receive payment in the name of the said Agent and that said Agent may endorse, deposit or otherwise collect any and all checks and other instruments for the payment of money that may be received by him under and by virtue of the rights, privileges or powers herein conferred. The Agent shall account for and pay to the Undersigned within thirty (30) days from the date of said sale the proceeds of said sale, less the costs and charges as herein specified in paragraph THREE.

SIX: The Undersigned does hereby agree that this Power of Attorney is and shall be exclusive and irrevocable and that the Agent shall at all times have a lien on the said Warehouse Receipts or the Whiskey represented thereby for all costs and charges as herein enumerated and set forth. That the Agent shall have the power to do, execute and perform any and all acts and deeds which are necessary to carry into full force and effect the purport of this Power of Attorney and to do the same as fully and effectually as the Undersigned could do if he were personally present. The Undersigned does further hereby agree to, and does hereby ratify and confirm all and whatsoever the said Agent shall do or cause to be done in or about the premises by virtue of these presents. This agreement, with the exception of the matters set forth in Paragraph Four (4) hereof, shall not be transferred or assigned, except by mutual consent of the parties hereto, in writing.

SEVEN: The Undersigned vouches himself to be the true and lawful owner of the said goods with full right and authority to dispose of the same in the manner aforesaid and further agrees to warrant and defend the said goods to the said Agent or to the purchaser of the same against all claims and demands.

EIGHT: That this Power of Attorney contains the entire agreement of the parties hereto and the Undersigned, having read this Power of Attorney, agrees that no representations were made other than those herein set forth.

This Power of Attorney is executed in triplicate, copies of which have been duly received by each of the parties hereto and receipt of which is hereby acknowledged, and entered into at Chicago, Illinois, on the _____ day of _____ 19____

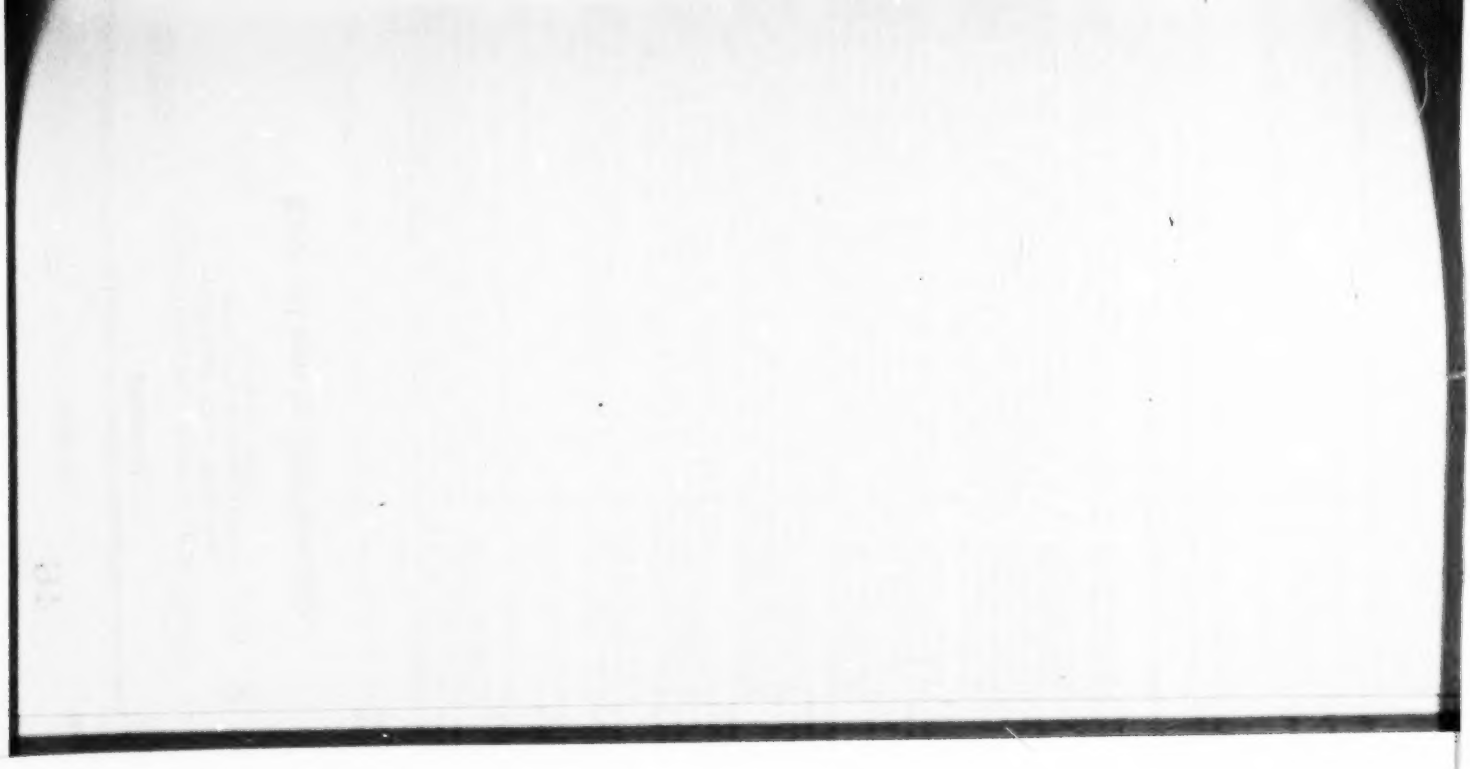
_____ (Seal)

CONSOLIDATED ASSOCIATES, INC.

_____ Address

By _____

_____ City and State



ORIGINAL

CABLE ADDRESS: CONASS, CHICAGO

TELEPHONE: DELAWARE 8813

CONSOLIDATED ASSOCIATES, INC.

Wholesale Liquor Distributors

620 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS

E 7288

Know all men by these presents . . .

that the "Undersigned" _____ of the

City of _____ State of _____

for and in consideration for the services and advances of money to be rendered by the CONSOLIDATED ASSOCIATES, INC., an Illinois corporation, hereinafter called "Agent" and in further consideration of the services and advances of money to be rendered and costs to be incurred by said Agent, and also in consideration of One Dollar ($1.00) and other good and valuable considerations this day in hand paid by the said Agent to the Undersigned, receipt of which is hereby acknowledged, the Undersigned does hereby appoint the said CONSOLIDATED ASSOCIATES, INC., an Illinois corporation, as its true and lawful attorney, and in his name:

ONE: The Undersigned does hereby deposit with the Agent Negotiable Warehouse Receipts for Whiskey-in-Bond for _____ barrels manufactured by _____ Distillery in the _____ of 19____ in the manner and for the purposes hereinafter set forth.

TWO: The Undersigned authorizes and directs the said Agent to cause to be bottled the Whiskey represented by such Warehouse Receipts at such time or times as the Agent may deem necessary or advisable and to cause Warehouse Receipts to be issued therefor. The Agent intends to cause the bottling of said Whiskey and to offer said bottled goods for sale after the Whiskey represented by the Warehouse Receipts herein described has been aged for a period of four (4) years from date of distillation.

THREE: The Agent shall use his best efforts to procure for the undersigned a purchaser or purchasers for the said bottled goods at the then prevailing prices, and the amount to be paid to the Undersigned shall be equivalent to the amount which the Agent receives from the sale of said bottled goods, less all taxes, insurance and expenses advanced or incurred by the Agent in connection with the withdrawal of the Whiskey from storage, transportation, bottling, stamping, labeling, financing, selling commissions, and one and one-half dollars ($1.50) per case payment for the Agent's services.

FOUR: The Undersigned hereby expressly authorizes the Agent to pledge or hypothecate said Warehouse Receipts, the said Whiskey or bottled goods or Warehouse Receipts therefor for payment of all charges and expenses hereinbefore set forth, which charges shall be paid before the sale thereof. In the event conditions prevent the sale of said bottled goods within a reasonable time after the bottling thereof, the Agent reserves the right to deliver or cause to be delivered to the Undersigned the Warehouse Receipts representing the said bottled goods, subject to all costs, charges and expenses referred to in paragraph THREE.

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EIGHT: That this Power of Attorney contains the entire agreement of the parties hereto and the Undersigned, having read this Power of Attorney, agrees that no representations were made other than those herein set forth.

This Power of Attorney is executed in triplicate, copies of which have been duly received by each of the parties hereto and receipt of which is hereby acknowledged, and entered into at Chicago, Illinois, on the _____ day of _____ 19____

_____ (Seal)

CONSOLIDATED ASSOCIATES, INC.

_____ Address

By _____

_____ City and State

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 101

MARK A. FREEMAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR CERTIORARI.

INTRODUCTION.

Because the Brief for the United States in Opposition is based on evident misapprehensions of both the factual and legal issues, a short reply is presented on behalf of petitioner.

STATEMENT.

The Statement in the Government's brief contains so many assertions unsupported by the record, and even contrary to the record, that correction is necessary.

1. In Footnote 3 at page 6, it is said that the public receipt holders must ultimately dispose of their holdings at maturity of the whiskey to a licensed bottling concern.

This is not true, because said receipt holders may hold the receipts after maturity, and may dispose of them to a licensed dealer, not necessarily a bottler, of which Consolidated was one.

2. Throughout the Government's brief appears a loose and inaccurate use of the word "guarantee". The witness Oldroyd, testifying for the Government, himself stated, at one of the pages referred to in the Government's brief (R. 115) that he "understood that the conditional contract * * * *was subject to revision and readjustment in accordance with the contract.*" At page 116 of the record, the same witness testified, "I did not understand the conditional trade acceptance by itself to be a guarantee of the payment of $70.00. * * * I know the conditional trade acceptance was not a guarantee so far as a legal document is concerned." The witness understood that the terms "revision" and "readjustment" was something which may be changed (R. 117). Oldroyd said, further, that Shields, the United States Attorney, who was one of the investors, "felt that there was an opportunity for him to get his money back, and *possibly a profit.*" (R. 116)

The record at pages 85 to 90, referred to by the Government, contains no mention of the use of the word "guarantee" or its equivalent. Similarly the record at page 116, also referred to, contains no support of the assertion that the customers were guaranteed a price. While the Government witness Wells loosely used the word "guarantee" (R. 169), his cross-examination (R. 181-182) discloses that the salesman told him he would receive about $8,000.00 to $8,200.00. He said that the petitioner, Freeman, "seemed to think" he would get a little more. He did not know what he was going to get per case. He said he "just tried to remember it as a lump sum." The same witness testified that when he talked to Freeman, *Freeman told him that the whiskey business "was highly speculative" and that the price he would get "would be governed by conditions as they prevailed at the time the whiskey was offered on the*

market" (R. 182). He said, further, "I think it was two or three times that I received word from Freeman in letters *that there was no guarantee* attached as to any amount I might actually receive". (R. 183) This, of course, is a complete refutation of the statement in the brief in opposition that petitioner knew that the salesmen were making promises guaranteeing any amount to be received by the customer. It is of the utmost importance to observe that the principal and lengthiest witness for the Government, Oldroyd, testified flatly as follows: "*Freeman called my attention to the fact that Consolidated Associates guaranteed no certain return.*" (R. 143)

3. At page 7 of the brief in opposition it is said that within the space of two months Consolidated "had difficulties with the Securities and Exchange Commission over the conditional trade acceptances." The record referred to in this connection, (R. 507) shows that the Securities and Exchange Commission advised Consolidated that the conditional trade acceptances *may be* construed as a security. The reference to page 675 of the record shows that petitioner was asked the direct question "After you had been advised by the Securities and Exchange Commission that that [the trade acceptance] was a security, you changed your plan, didn't you?" The answer was, "No, sir." When he was asked if "those things happened simultaneously", he answered "No, they did not."

4. At page 7 et seq. of the brief in opposition, it is said that the customers, after the abandonment of the conditional trade acceptance method of doing business, were approached with a new proposition; that they were told that their whiskies were of poor quality and difficult to bottle properly. So far as the record is concerned, this statement, if it was made, was true. Oldroyd admitted that the whiskey he had previously sold to his individual customers was inferior to Bernheim (R. 109), and that the market on it "had been depressed considerably" (R. 110). The Gov-

ernment asserts that the customers were told that Consolidated had acquired a large amount of Bernheim. This also was true, *the Government accountants themselves testifying that 11,669 barrels of whiskey had been paid for in full* (R. 312). As to the representation that Consolidated would bottle the Bernheim whiskey under the I. W. Harper label, the Court is respectfully referred to page 69 of petitioner's Petition and Brief where the testimony of witnesses upon the subject of the I. W. Harper representation is referred to with record references. None of the record references used by the Government in this connection sustains the statement in support of which they are cited.

5. While the reference to page 99 of the record, unexplained, might create an inference that Freeman had authorized one of his associates to represent that the Bernheim was to be sold under the I. W. Harper label, the witness's testimony on cross-examination completely refutes any supposition that Freeman was directly or indirectly the author of any such representation. The statement is as follows:

> "I stated to Garfield in Chicago substantially what I have just stated here, and he told me it would be bottled out as I. W. Harper. *I had been informed by Freeman prior to that time, by a letter under date of October 10th, that the whiskey was only to be bottled out as Old Switch.* As I recall it, October 10th was the date of the letter. I received it about a week or ten days later. That was my principal reason for coming to Chicago. I returned to Salt Lake City thereafter. When I was told by Garfield that the whiskey was to be bottled out as I. W. Harper, I had already been told by Freeman that it was to be bottled out as Old Switch. *That was an instance of my preferring to take Garfield's word against Freeman's.* I don't know of any special differences between Garfield and Freeman from time to time." (Italics supplied)

6. The Government asserts that petitioner made promises, when the power of attorney method of doing business was adopted, guaranteeing the amount the customers would receive, and fixing the fall of 1940 as the bottling date. Pages 92-93, 208-209, and 243 are cited in support of this assertion. The record at page 92 shows that Freeman told Oldroyd that the company had not guaranteed any return, that he knew promises had been made *as to the conditional trade acceptances* and he did not want them dissatisfied. Page 93 contains nothing whatsoever on the subject. Pages 208-209 of the record are likewise bare of any hint of any such promise on the part of petitioner. Page 243 does not even contain Freeman's name.

7. While there is no doubt that whiskey owned by the customers was hypothecated, which was well within the authority granted by the powers of attorney, it is also true, as has been said, that 11,669 barrels had been paid for in full (R. 312) and that the whiskey pledged was of vastly greater value than the amount of the loans, as is disclosed by the fact that the total indebtedness at the time of the close of business was approximately $340,000.00 and the whiskey was sold under the auctioneer's hammer for approximately $650,000.00.

8. The Government states that Consolidated disposed of the whiskey received in trades without loss (Gov. Br. 9), (as to which, of course, there can be no complaint). Except in two instances the exact amount received from the sale of such whiskey was accurately and immediately reported to the customer. In one of these instances, which is referred to by the Government as appearing at page 376 of the record, Consolidated made a profit of approximately $600.00, and in the other of these instances the customer's whiskey brought more than was reported, whereupon petitioner gave to the customer an additional barrel of Bernheim (R. 195). It is interesting to observe, in this connec-

tion, that the Bernheim whiskey traded to the customer in this instance was paid for in full and the warehouse receipts received (R. 376).

9. The Government, at page 10 of its brief, states that the customers were approached with a new proposal and advised to switch from Bernheim to younger whiskies to be used as blends. Omitted from the statement is the fact that when the customers were so approached, only 80 to 100 of the customers were interviewed (R. 585) and that it was suggested to them *either that Consolidated purchase the customer's receipts outright,* or for the customers to keep part of their Bernheim whiskey for use in the current production of a blended product (R. 586). It is said (Gov. Br. 10) that the customers were told that because of the new Federal tax the whiskey market was depressed and that it would not be profitable to bottle the Bernheim at that time. There is no contradiction of this fact in the record.

10. Throughout the statement of facts and in the argument, reference is made to the so-called "secret profit" made by Consolidated on the exchanges effected with the customers. Obviously there could be no secret profit since the customers were immediately advised as to the balances due from them, as the Government admits at page 9 of its brief.

11. At page 10 of the Government's brief, it is said that, despite its meager capitalization, Consolidated did a cash business of approximately $2,000,000 during its existence. This so-called cash business included not only transactions with customers under bottling contracts, but also the sale of whiskey to ordinary customers with no bottling arrangement (R. 515), a general brokerage business consisting of buying and selling as broker with brokers, and the purchase of whiskey of particular runs for particular concerns to bottle under their own labels (R. 529). Much of the amount

involved, therefore, did not represent a cash business in the sense that it involved the actual purchase and sale of whiskey.

12. A misleading statement is made when the Government asserts, at page 10 of its brief, that 31,000 barrels of whiskey was acquired from customers. At the following page of the brief, it appears that at the close of business Consolidated "owed" its customers 13,811 barrels of whiskey (R. 314) and that it had on hand, subject to an indebtedness, 14,194 barrels. It must be remembered, too, that the whiskey obtained from the customers was of inferior grades and of smaller value, than the whiskey traded to them by Consolidated. Mention of the indebtedness is made as being in the sum of $340,207.72. Omitted from the statement are the facts that the whiskey was sold at forced sale for $650,000. No consideration whatsoever is given to the circumstance that a large amount of money was owing to Consolidated by its customers and by taverns, restaurants, and other buyers at the time of the close of business (R. 383-384, 398, 399). The Government accountants did not take the value of these assets into consideration. Furthermore, Consolidated had a total of upwards of 600 customers. Only a portion of these investors held whiskey under the new bottling contracts (R. 514).

ARGUMENT.

In making numerical captions to the portions of the argument, the numbers are the same as those appearing in the Government's brief.

1.

For its first specification that sufficient evidence was adduced to warrant a conviction, the Government cites, at page 11 of its brief, "the tricky and dishonest 'power of attorney' under which the customer surrendered his warehouse receipt and received no definite promise in return".

The Government does not see fit to state in what respect the power of attorney was tricky or dishonest. Certainly failure to make a promise on the part of the attorney is not unusual in power of attorney forms. A power of attorney is a grant of authority, and ordinarily an agent makes no promises therein. The Government's complaint in this respect is inconsistent with the charge of its statement of facts that definite promises were made. Moreover, its use of an argument premising an evil intent on the power of attorney, coupled with its statement in its statement of facts at page 9 that "these forms were drawn up at petitioner's direction", highlights the contention made in the petitioner's brief (p. 39) that the refusal of the Court to admit his attorney's advice and direction with respect to the drawing of the power of attorney was prejudicial. The Government cannot now claim that such error was unprejudicial when it has in its brief in this Court attempted to draw such an inference from the power of attorney.

If the Court will examine the power of attorney itself, which appears in the appendix to Petitioner's Brief (p. 97), it will find that its provisions are straightforward, unambiguous and in no respect deceptive or tricky.

The assertion that the exhibits show that petitioner was repeatedly put on notice of the statements by his salesmen, and that he consistently evaded explanation is unsupported except by reference to two Government exhibits, 193 and 194. For the Court's information, copies of these exhibits have been reproduced and appear after the end of this brief. In no respect do they confirm the statement in support of which they are used.

The desultory argument of the Government on this point concludes with the statement that it is unnecessary in a prosecution for using the mails in furtherance of a scheme to defraud that all of the alleged false representations be proved. Petitioner's point on this application is that none of the alleged misrepresentations was proved to have been made by Freeman, or was authorized or permitted by him

to be made by any representative of Consolidated Associates. The Court's attention is respectfully redirected to point VIII of Petitioner's Brief at page 67 to 70, inclusive, wherein it appears that the Government failed in its proof as to the "lulling" payments charged in the indictment, that Government witnesses testified that there was no representation as to the prospective use of the I. W. Harper label, that petitioner repeatedly wrote to and told the customers, as well as the principal witness Oldroyd, that there was no guarantee, that the whiskey business was highly speculative, and that the price received would be governed by market conditions. In short, no answer is made to Petitioner's point VIII (p. 67).

2.

The second point of the Government's argument dealing with the trial and sentencing for both the substantive offenses and conspiracy admittedly fails to answer the contention, and attempts to excuse its failure by citing *Hirabayashi* v. *United States,* 320 U. S. 81, 105. This decision merely stands for the proposition that where one count of an indictment will support a sentence, an appellate court will not inquire as to whether the other count is good in law or has been properly proved. This has nothing to do with the legal issue presented by the petitioner's brief (Point II, p. 43). As this Court has said in *Pinkerton* v. *United States,* 328 U. S. 640, 643, "There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime." *In that case this Court cited with evident approval Freeman* v. *United States,* 146 F. 2d 978, which the Government in its brief would have the Court disregard. In the *Pinkerton* case this Court applied the identity test, as was done in *Sealfon* v. *United States,* 332 U. S. 575, cited in the petitioner's brief. The

Government fails completely to make any attempt to meet the issue as to identity of offenses, and it must be presumed that it cannot do so. If the petitioner were lawfully convicted and sentenced for conspiracy, for which the maximum is two years, obviously to sentence him to a five year term is double punishment. Compare *United States* v. *Noble* (CCA 3) 155 F. 2d 315, 318.

The question of identity of offenses is concerned with both statutory definitions and with proof of facts. The sentencing of petitioner on the substantive offenses and the conspiracy charge making the sentences run concurrently cannot affect the error *in submitting the defendant to the jury on both classes of offenses.* The post-trial circumstance that the judge made the sentences run concurrently after verdict, was a matter of judicial discretion which cannot be regarded as decisive of the question, *should the defendant have been submitted to the jury on both classes of offenses.*

In the instant case the identity of the offenses as charged appears in the indictment itself, and the identity of the offenses as proved is demonstrated by the record. The question cannot be evaded by generalization. As this Court said in the *Sealfon* case, the answer to the question "depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial" (p. 579). The Court said, further, that the instructions under which the verdict was rendered must be set *in a practical frame* and "viewed with an eye to all the circumstances of the proceedings". (p. 579).

As the Court will see from the Government's brief, it is not contended that the evidence was not practically identical in proof of the substantive counts and the conspiracy count. There was no separation or allocation of the evidence during the trial or in the instructions. An examination of the indictment itself shows that the charging part of the conspiracy count alleges not only *the agreement to attempt to execute the scheme* by placing mail matter in the Post Office

establishment, but also "that the defendants in pursuance and furtherance of said unlawful combination * * * and to effect the object of the same" *did actually make the false representations* and "*did place or cause to be placed in the Post Office of the United States at Chicago * * * certain letters* * * * all as charged and alleged in Counts 1 to 28 inclusive herein preceding this count, by the means and in the manner set forth in each of these counts" (R. 63). Thus, the offense charged in the conspiracy count *is in all substantial respects a duplication of the offenses charged in the preceding substantive counts.* No authority need be cited in support of the proposition that the pleading of overt acts does not aid a defective indictment for conspiracy. (See *United States* v. *Britton,* 108 U. S. 199, 204.)

The instructions of the trial court to the jury, upon which this Court places importance in its decision in the *Sealfon* case, were, in the case at bar, completely confusing. The court spoke of the charges in the substantive counts as a conspiracy, and, belatedly instructing on a conspiracy count only by the vaguest of generalities, did not take the precaution to explain to the jury that the two offenses were separate and distinct, upon which separate sentences could be imposed.

In the conclusion of its brief, the Government asserts that there is no conflict of decision involved, but *in its footnote to page 12 of its brief, it is said that the Government does not agree with Freeman* v. *United States, 146 F. 2d 978 (CCA 6), an obvious admission of a conflict of authority.* No mention whatsoever is made of *Krench* v. *United States,* 42 F. 2d 354, or of *Hendry* v. *United States,* 233 F. 5. The question presented by this point of petitioner's application requires that, in the fair administration of justice, this question be finally determined by this Court.

3.

Attempt is made to answer petitioner's arguments as to the insufficiency of the indictment by the broad assertion that the particulars of the scheme need not be pleaded with

all the certainty as to time, place and circumstance requisite in charging the gist of the offense, which is the mailing of the letter or other article in attempted execution of the scheme. As is well known, 99% of the proof in a mail fraud case consists of evidence in support of the charge that the scheme itself was fraudulent. *The fraud appears in the scheme and not in the mailing.* The repeated assertions by this Court that indictments for serious offenses must charge with precision and certainty, and that "every ingredient of which it is composed must be accurately and clearly alleged" is brushed aside by the Government. None of the arguments contained in point IX of Petitioner's brief (page 72) is answered. It is contended that the matters of which petitioner complains fall "rather within the scope of a bill of particulars". That is not the point. Petitioner complains that there were thrown at him in the indictment, thirty-one charges of misrepresentation without any specification of time, place or circumstances, a procedure which was condemned in *Fontana* v. *United States,* 262 F. 283, 286 (Petitioner's Br. 74).

This Court, it is believed, should announce that it is not the purpose of the law to permit the prosecution to plead as little as possible, as indefinitely as possible, and wait for a motion on the part of defense for a bill of particulars. There would seem to be a duty in limine upon the prosecutor to state his cause of action.

4.

In point 4 of the Government's brief, which attempts to answer point I of petitioner's brief, there is manifest a complete misapprehension of the record. It is argued (Gov. Br. 14) that the Court permitted petitioner to introduce a considerable amount of evidence designed to show that a large competitor had taken active steps to defeat the bottling program, and that Consolidated's largest creditor (Klein) complicated the program by refusing to turn over the warehouse receipts except after endorsing them "without re-

course". Attempt is made to tell this Court that the trial judge did not eliminate evidence so admitted in his final charge to the jury. In this connection a disjointed and garbled version of the record is made. In a footnote (Footnote 7, page 15) counsel for the Government say that they think it clear from the quoted language (as quoted by them), that the Court *merely meant* to tell the jury that while they could consider the facts of interference with the bottling program, they were to exclude from consideration all details of Consolidated's collateral difficulties. The question is, not what the Court meant to tell the jury, but what the Court did tell the jury. The record takes the matter from the region of conjecture. The Court told the jury that the amount for which the whiskey had been sold at public auction, evidence of which had been admitted, *"in and of itself means nothing at all"*.

The Court also said to the jury in its final charge "Another matter *thrust before you* and argued to you concerns a controversy between Mr. Freeman and the owners of the I. W. Harper trade-mark or trade-name. *This is a matter entirely foreign to this suit,* and a limited amount of evidence was admitted concerning it only for the purpose of permitting Mr. Freeman to try to show his good faith in these transactions. Whether or not the I. W. Harper people interfered with the efforts of Mr. Freeman and his associates to sell Old Switch and the extent and character of that interference *is a side issue and a separate matter which could not* be *tried in this case.* If there was such interference, it may or may not be justified and it is not for us to pass on here." (R. 815)

The attorneys for the Government should not be permitted to attempt to sustain an erroneous judgment of conviction and an utterly inadequate decision by the Court of Appeals by arguments such as are addressed to this Court in the Government's brief.

The prosecution seeks cover in the statement that petitioner's intent to bottle was not necessarily crucial since

he could have been convicted on the evidence of the secret profits alone (Gov. Br. 15).

In the first place it is difficult, if not impossible, to find a charge of "secret profits" in the body of the indictment itself. The scheme charged, and the great bulk of the evidence introduced by the Government was deliberately calculated to convince the jury that the defendant's intent was to engage in a pretended bottling enterprise, the completion of which for the customer's advantage was not actually contemplated. This was the essence of the indictment and the burden of the Government's evidence.

As to whether or not, from an evidentiary standpoint, there was any "secret profit", the testimony of Government's witness Oldroyd knocks the Government's contention in this respect into a cocked hat. Oldroyd's testimony in this connection is conclusive. He said "I asked him [Freeman] if that was to be made on an even barrel-to-barrel basis, *and he said no, that would be based upon the then prevailing market price of the whiskey which had been owned by these people and Bernheim whiskey which was owned by Consolidated Associates.*" (R. 93.) At another point in the record Oldroyd said, "when the customer was going into that power of attorney transaction, I was told that it was to be traded on the present market value of the whiskey which was being turned over and the market value of Bernheim which was given him". (R. 123.) Oldroyd himself bought Bernheim whiskey at a wholesale or special price for his own purposes at $42.50 per barrel with the understanding that it was not to be sold in excess of $52.50 (R. 124). *There is no evidence whatsoever in the record that the price basis upon which whiskey was traded to the customer was excessive or unfair.*

The insufficient description, in the Government's brief, of the evidence excluded by the trial court requires that this Court be left in no doubt as to the nature and extent of the evidence so excluded. The court excluded:

1. The petition for reorganization;
2. The amount received from the sale of the assets;
3. The amount received by the customers as dividends;
4. The attempts to negotiate transactions which would insure the completion of the bottling program;
5. The outside resistance and interference exerted by a powerful competitor;
6. The testimony of Consolidated's sales manager as to the nature and extent of the unfair competition encountered;
7. The effect of the "without recourse" endorsement upon bottling plants where Freeman attempted to have the whiskey bottled (R. 757);
8. The testimony of one Goodman, a salesman for Consolidated who travelled over eight states, and who offered to testify as to the reception of Consolidated's product by wholesalers, the success of the sales, the interference with the sales, and his conversation with petitioner as to all of these factors (R. 454-455);
9. The testimony of one Salinger employed to qualify Consolidated's products in 17 states, who was not allowed to testify as to opposition encountered (R. 740);
10. The testimony of the Assistant United States District Attorney as to the complaint filed by Schenley against Consolidated, and as to the disproof of every element of such complaint after investigation by the District Attorney's Office (R. 772-778);
11. Petitioner's effort to stop the forced sale of the assets and his contention in the District Court in the reorganization proceedings that the whiskey actually belonged to the customers (R. 641);
12. Klein's attempt to acquire the whiskey;
13. Klein's connection with the Schenley interests (R. 610);
14. The advice of counsel obtained by petitioner in the drafting of the contracts with the customers;
15. The actual condition of Consolidated as shown by the schedules filed in the reorganization proceedings.

These and many other evidentiary factors, which any fair trier of facts would require in order intelligently to pass upon the question of guilt or innocence, were excluded.

5.

In point VI of Petitioner's brief, the authorities and the record were specifically pointed out to this Court in demonstration of the argument that the books and records of Consolidated were admitted in evidence without identification or foundation. It was explained that the statute (Title 28, U. S. C. A., Sec. 695), which is concerned with "entries", requires that it must appear that any entry so sought to be introduced in evidence must appear to have been made in the regular course of business, that it was the regular course of such business to make such entries, and that they were made at the time of, or within a reasonable time after, the event which they seek to record took place. Counsel for the Government make the flat statement that identification was made by an employee who testified that she worked on some of the books, that she was familiar with all of them, that they were kept in the regular course of business, and that the entries were made at or about the time of the entries recorded (Gov. Br. 14-16). In view of the record this statement is preposterous. The witness said that the total period of her employment was six months, that she worked only on bottling records, and upon those for only a fraction of the period involved. *She knew nothing of the entries in any other of the exhibits at any time,* and, obviously, she said she knew nothing about what transpired after she left the company's employ. The trial judge, at one point, said that it was not intended to prove entries, but merely to prove books (R. 287, 288) and said that it did not make any difference whether the witness had knowledge of the entries on the books or not (R. 302), and that she could not be expected to know anything of her own knowledge when she was not there (R. 330).

No better example of the bias of the trial judge is revealed than in his effort to make good his erroneous admission of this documentary evidence. *Completely apprised of the lack of knowledge of the witness, the trial judge, nevertheless, himself went on to ask her, "Were the entries made in these books * * * made at or about the time transactions reflected thereon occurred"* (R. 285). He asked the witness, also, "You saw other entries made, didn't you, by other people?" When she answered in the affirmative, the Court asked, "Were they made correctly when they were made?" (R. 299).

The trial court flagrantly disregarded, and the Court of Appeals disregarded, and the Government in its present brief disregards, the statute and the decision of this Court in *Palmer* v. *Hoffman*, 318 U.S. 109, 113-115, cited at page 152 of petitioner's brief. Petitioner's objections do not go to the "weight" to be accorded to the evidence, as the Government contends, but go to the very basis of admissibility.

6.

As in other points of the Government's brief, its point 6 makes no attempt to answer petitioner's point IV as to the admissibility of the testimony of Post Office Inspector Sugg, except to say that the evidence was relevant on the ground that it constituted an admission against interest on petitioner's part. The record to which the Government alludes as statements made by the petitioner to the inspector, relative to complaints filed with the Post Office Department, *contains nothing in the nature of an admission.* At page 429 of the record it appears that the Inspector told Freeman that he had a complaint about a transaction with one of the customers. Freeman knew nothing about it and called in the man who handled the transaction (R. 429-430). At page 431 of the record it again appears that the Inspector told Freeman he had another complaint and here, again, Freeman said nothing in the nature of an admission (R.

431-432). What actually happened was that the Inspector got before the jury the fact that complaints were made, not necessarily even to him, but to the Post Office Department, and if this isn't hearsay nothing is. On the face of it, the statement that customers had made complaints was necessarily damaging and dangerous and highly prejudicial evidence.

7.

In Government's point 7 (Gov. Br. 17) it is admitted that there was an occasional severity to defense counsel. But, it is said, the trial judge was "sorely tried by their conduct". *It is significant that no record reference is cited in support of this assertion.* When, where and how did any defense counsel sorely try the judge during the course of the trial? Certainly, the remark of one of counsel for the defense in his final argument cannot justify all of the events demonstrating judicial bias and prejudice which occurred before that time.

The Government fails to excuse the unjudicial acts described in Petitioner's Brief (Br. 55 et seq.) which culminated in the unprecedented and revengeful action of the court in striking from the record evidence bearing on the vital question of intent which he had previously, albeit reluctantly, admitted.

The Government attempts to justify the court's attitude by stating that despite the agreement to prevent unnecessary objections, defense counsel repeatedly interposed objections. For evidence of the agreement it cites the record —pages 77-80. Examination of these pages discloses that there was no agreement of any kind with respect to objections. The agreement merely was (which the rules now allow anyhow) that no *exceptions* would have to be made to the court's rulings. The other excuse for the court's hostile attitude is that despite the court's clear rulings, defense counsel never ceased in their efforts to get before the jury the details of the Klein and Schenley affairs and

the bankruptcy proceedings. It is a strange commentary upon the standards of judicial conduct that a litigant shall suffer because his counsel and the court disagree as to the materiality of evidence. *A fortiari,* where the evidence sought to be admitted was admissible, counsel's insistence upon his rights is no excuse for prejudice and bias by the judge. It is difficult to reconcile the Government's statement on page 17 of its brief, with respect to the court's so-called repeated and clear rulings respecting the Klein and Schenley affairs and the bankruptcy proceedings, with its contention on page 14 that the court permitted these matters to be brought before the jury for its consideration. Evidently extended persuasion must have been necessary. *The Court of Appeals failed utterly to give any consideration to this subject.*

8.

In point 8 of its brief, the Government asserts that no prejudice resulted to petitioner, since prompt apology was made and the jury instructed three times to ignore the prosecutor's vicious statement that petitioner duped the investors, and that he was a liar, a thief, a confidence man, and an old hand at the game. This language might be expected in a police court, but, since the frequent admonitions to prosecutors by this and other courts, arguments of such desperate nature are now seldom encountered. When counsel say that all of these statements, except one, were within the evidence, they mean, evidently, that petitioner was a liar, and a thief, and a confidence man. There is no evidence in this record that petitioner lied. There is no evidence that he was a thief and there was no evidence that he was a confidence man. Everything in the record points to the contrary.

The so-called apology made by the prosecutor was contained in the language "I am sorry, Counsel. I didn't mean it" (R. 793). This statement referred to only one of his

assertions to the effect that the defendants were old hands at the game. In no manner did he apologize for calling petitioner a thief, a liar, or a confidence man.

Upon objection by petitioner's counsel, the court merely said "The jury will disregard *that evidence*". There was no such evidence. The court went on to say, "I am saying that remark will be disregarded—there is no evidence of any other events—" (R. 793). At page 794 of the record, it appears that the court said "Ladies and gentlemen, Mr. Miller made *a remark* to which exception was taken which I instructed you to disregard. I want you to know I meant what I said. You are to disregard that remark. It has no part in the trial of this case." Mr. Miller did not make one remark, but a number of them, and the court did not specify which of the statements he was instructing the jury to disregard.

Again at page 813 of the record, the court called attention to "Mr. Miller's remark yesterday about some of these defendants". He said this was improper, uncalled for, and could have the effect of being prejudicial. He said "I instruct you to disregard those remarks. *I trust you will be able to do so and you will do so.*" Again there was no specification as to what remarks the court was alluding. And this last advice to the jury was but a prelude to the devastating charge to the jury following defense counsel's statement that "the search for the truth still fails".

Under the circumstances there was no adequate correction of the evil results which must necessarily follow an argument of a public prosecutor whose official position a jury is always prone to respect.

The Government's Brief, page 18, attempts to excuse the statements by saying that, with the exception of the characterization of Freeman as an "old hand at the game", the statements were within the evidence and therefore not improper. Such a strong factual statement calls for a citation of the record. That the Government has been unable to make any citation of evidence to the effect that petitioner

was either a thief or a confidence man is a practical concession that there was no such evidence.

9.

The Petition and Brief herein point out the inadequacies, the confusion and other error in the trial court's charge to the jury. Plainly the Circuit Court of Appeals did not pass on these deficiencies. The Government, here, does not see fit to answer any specific one of them. Hence no reply is necessary.

CONCLUSION.

The opinion of the Circuit Court of Appeals furnishes within itself no guide to this Court in determining whether the affirmance of the judgment of conviction was right or wrong. The Government's brief makes no attempt worthy of the name to support either the judgment of the District Court or the cavalier dismissal of petitioner's contentions by the inadequate, confusing and sometimes incomprehensible opinion of the Circuit Court of Appeals.

Running through the petition for certiorari and the brief in support of the petition is the theme that the petitioner was deprived of his right of consideration by an appellate court of the errors which transpired in the trial court. A mere perusal of the opinion of the Circuit Court of Appeals discloses a summary dismissal of serious charges of error. The Government at no point attempts to show that this petitioner received proper consideration at the hands of the Circuit Court of Appeals.

It is the summary disposal of an appeal in an important case, fairly presented and seriously argued, which compelled the filing of the instant petition. In full legal effect, failure to issue the writ of certiorari will result in the deprivation of petitioner's right to have his case adequately reviewed. It is inconceivable that a large portion

of a defendant's life can be sliced from his existence under the unfortunate judicial policy that after all this is only another criminal case.

It is again earnestly urged that the writ of certiorari issue and that this court consider the questions presented.

Respectfully submitted,

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EDWARD J. SCHAUF, D. D. S.
SUITE 302, MAJESTIC BLDG.
QUINCY, ILL.

CONS. ASSO. INC.
RECEIVED
DEC 23 1939
For

Consolidated Associates Inc.
620 N Michigan Ave
Chicago Ill.

Att: Mr Mark A. Freeman.

Dear Sir:

When I made an exchange on some whiskey a few months ago and also purchased 36 additional bbls of Bernheim at $50.00 per barrel from your Mr K. Lang, he showed me a pint bottle of I. W. Harper whiskey, it retails at $1.49 a pint here in Quincy and told me that is what I would be buying from him, and he assured me a price of $24.50 a case, which would make me a very nice profit. Now in my contract I noticed that I am to buy I. W. Harper Whiskey and nothing is said about price except you are to get [illegible] of what price the whiskey is sold at.

Apparently Mr Lang has misrepresented to me what I am supposed to receive. So I want a new contract showing this whiskey is to be bottled under the I.W. Harper label as was represented to me and a price of at least $21.00 per case or I want my Warehouse Receipts for 100 bbls of Bernheim fall of 1936, as I am not going to pay you $1.50 a case about $1900.00 commission on this transaction and me be left holding the bag, I can sell this whiskey at $1.00 a barrell commission and you be to secure about $19.00 a barrel commision, no, can't be done, I want what was represented to me or I want my receipts.

Yours truly
Edward J Schauf

Defendants Exhibit
Comm. Exhibit 193
In the District Court of the United States, for the Northern District of Illinois
Case Edward Neulander - Official Court Reporter
( ) Ident. ( ) Rec'd.

CONSOLIDATED ASSOCIATES, INC.
620 NORTH MICHIGAN AVENUE
CHICAGO, ILLINOIS

DECEMBER 29, 1939

DR. EDWARD J. SCHAUF
SUITE 302, MAJESTIC BLDG.
QUINCY, ILLINOIS

DEAR DR. SCHAUF:

WE ARE CARRYING FOR YOUR ACCOUNT WAREHOUSE RECEIPTS COVERING ONE HUNDRED (100) BARRELS OF WHISKEY-IN-BOND, DISTILLED BY BERNHEIM DISTILLING COMPANY, LOUISVILLE, KENTUCKY, SERIAL NUMBERS UNDER DATES OF AUGUST 24, 1935, AND OCTOBER 17, 1939, AND SUBJECT TO THE TERMS OF OUR POWERS OF ATTORNEY NO. C-2628 AND D-5252, COPIES OF WHICH YOU HAVE IN YOUR POSSESSION.

WE HEREWITH BEG TO ADVISE YOU THAT THE CASE GOODS THAT WILL COME OUT OF THIS 100 BARRELS OF BERNHEIM WILL NOT BE SOLD BEFORE SUBMITTING TO YOU THE PRICE AT WHICH SAME MAY BE DISPOSED OF. IF, FOR ANY REASON, YOU SHOULD NOT DESIRE TO SELL AT THE PRICE MENTIONED, WE WILL DELIVER TO YOU, SUBJECT TO THE TERMS OF THE ABOVE NUMBERED POWERS OF ATTORNEY, THE WAREHOUSE RECEIPTS COVERING SAID GOODS.

TRUSTING THIS IS THE INFORMATION YOU DESIRE, AND ASSURING YOU OF OUR WILLINGNESS TO COOPERATE WITH YOU IN EVERY POSSIBLE MANNER, WE ARE

YOURS VERY TRULY,

CONSOLIDATED ASSOCIATES, INC.

Commonwealth's Exhibit 194 Defendants Exhibit
In the District Court of the United States, for the Northern District of Illinois
Case
Identified Rec'd.
Edward Neylander - Official Court Reporter
MAF

E.J.S.
8-6-41

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 101

MARK A. FREEMAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 890-898) is reported at 167 F. 2d 786.

JURISDICTION

The judgment of the circuit court of appeals was entered April 15, 1948 (R. 899), and a petition for

rehearing was denied May 17, 1948 (R. 920). The petition for a writ of certiorari was filed June 16, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to justify the verdict.

2. Whether a mail fraud indictment against two or more defendants necessarily involves a charge of conspiracy, and whether petitioner was therefore subjected to double jeopardy by the trial court's refusal to require the Government to elect to proceed either on the substantive mail fraud counts or on the conspiracy count.

3. Whether the indictment failed to state the elements of the alleged offenses with sufficient precision and certainty.

4. Whether the trial court erred in excluding certain evidence offered to show that petitioner intended to perform the bottling contracts.

5. Whether the trial court erred in admitting the corporation's account books in evidence as records made in the regular course of business.

6. Whether the trial court erred in permitting a post office inspector to testify as to the details of a conversation between himself and petitioner.

7. Whether the conduct of the trial judge was unreasonable, arbitrary and hostile, thus depriving petitioner of a fair trial.

8. Whether the closing argument of the prosecuting attorney contained improper and prejudicial statements.

9. Whether the trial court's instructions to the jury were misleading and prejudicial.

STATUTES INVOLVED

Section 215 of the Criminal Code (18 U. S. C. 338) provides in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be

delivered by the person to whom it is addressed, any such letter, postal card, package, writing; circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

The Act of June 20, 1936, 49 Stat. 1561 (28 U. S. C. 695), provides:

> * * * in any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. * * *

STATEMENT

On February 26, 1943, a twenty-nine count indictment was filed in the District Court for the Northern District of Illinois against petitioner, Herman Garfield, Josephine Drose, and ten others. The first twenty-eight counts charged use of the

mails in execution of a scheme to defraud, in violation of Section 215 of the Criminal Code; the twenty-ninth count charged a conspiracy to commit such violations. (R. 2-65.) The defendant Garfield died before trial[1] (R. 73). At the close of the Government's evidence certain counts were dismissed, leaving in the case counts 2, 3, 4, 7, 10, 11, 16, 19, 20, 22, 23 and 29 (R. 444, 451). The defendant Miss Drose was acquitted. The jury failed to agree as to the other defendants, exclusive of petitioner. Petitioner was found guilty on all counts remaining in the indictment, and on April 3, 1946, he was sentenced to imprisonment for five years on each of the mail fraud counts and for two years on the conspiracy count, all the terms to run concurrently. (R. 843, 847-850.) The judgment was affirmed by the Circuit Court of Appeals for the Seventh Circuit (R. 899).

The evidence in support of the verdict against petitioner may be summarized as follows:

Consolidated Associates, Inc., was incorporated on December 31, 1938, with a capitalization of $25,000 (R. 74). Petitioner and Garfield seem to have been the sole contributors to capital. Petitioner contributed roughly $3,000 in cash and was credited with a contribution of $4,700 in the form of furniture and fixtures; $15,000 more was obtained

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[1] The files of the Department reveal that two of the other defendants, Epstein and Sidney Davis, pleaded guilty and had been sentenced prior to trial.

through a bank loan secured by certain stock held by petitioner and Garfield. (R. 355, 667-669, 737.) Petitioner was president of the corporation and in complete charge of its internal operations (R. 92, 645).[2] The corporation held a wholesale liquor dealer's basic permit issued by the Bureau of Internal Revenue (R. 426, 532).

In May 1939, Consolidated's salesmen began to contact holders of whiskey warehouse receipts[3] (R. 395, 494-495). At the time the value of these receipts had depreciated and the holders stood to take a considerable loss on their original investment (R. 110, 176-177, 227, 235, 239, 459). The holders were asked to turn their receipts over to Consolidated for bottling and sale of the whiskey at maturity;[4] the holders were told by the salesmen that Consolidated's only interest in the matter was its fee of $1.50 per case for handling, and they were orally

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[2] Garfield was vice-president (R. 429). Miss Drose was the bookkeeper (R. 75). The other defendants were salesmen (R. 659-665).

[3] Since whiskey must age in the barrel for four years under Government supervision before it can be "bottled in bond," the smaller distilleries find it necessary to sell the warehouse receipts on the "green" whiskey to the public in order to finance themselves (R. 476-481). Of course, these receipt holders must ultimately dispose of their holdings at maturity of the whiskey to a licensed bottling concern.

[4] Some of the receipt holders seem to have been told that Consolidated would do the bottling itself (R. 88, 158, 270). Actually, Consolidated never had, and never applied for, a license which would permit it to engage in bottling operations (R. 426, 671).

guaranteed a price in excess of their original investment (R. 85-90, 115-118, 166, 169-170, 247, 269-270). In return for their receipts the holders were given a "conditional trade acceptance" (Pet. 95) in the amount orally guaranteed by the salesman, subject, however, to a contract (Pet. 96), under which title to the receipts passed to Consolidated, which left the time of bottling and sale of the whiskey entirely to the discretion of Consolidated, which permitted Consolidated to pledge the receipts for bottling charges, and which provided that the price stated in the "conditional trade acceptance" should be subject to revision "after the bottled goods are sold to reflect the actual purchase price as fixed herein." These forms were drawn up at petitioner's direction and they were sent out by him to the salesmen from the Chicago office (R. 118, 495, 652.) Despite provisions of this contract the receipt holders were assured orally that the amount they would receive would not fall below the price stated in the "conditional trade acceptance" (R. 115, 117, 166, 169, 181). Petitioner knew that the salesmen were making these promises (R. 92, 119, 181, 183).

Within the space of two months Consolidated had difficulty with the Securities and Exchange Commission over the "conditional trade acceptances" and that method of operation was abandoned (R. 507, 675). The customers were then approached with a new proposition. They were told

that their whiskies were of poor quality and difficult to bottle profitably (R. 92, 242, 505-507); that Consolidated had acquired a large amount of Bernheim, an excellent whiskey of an earlier maturity, and that they would realize greater profits at an earlier date if they would trade their receipts to Consolidated for Bernheim receipts at the prevailing market and then permit Consolidated to bottle and sell the Bernheim for them under the "I. W. Harper" label (R. 92-99, 119-122, 159, 161, 169-170, 242). The "conditional trade acceptance" and contracts were cancelled, and the customers were asked to execute a "power of attorney" (Pet. 97) which resembled the original contract in that it gave Consolidated power to pledge the warehouse receipts and discretion as to the date of bottling and sale, but differed in that it constituted Consolidated the customers' agent to effect the bottling instead of transferring title, and also in that it contained no statement of a definite amount to be realized. Petitioner had the "power of attorney" prepared (R. 517-518). About this time a great many new customers were persuaded to exchange their receipts for Bernheim receipts and to execute the "power of attorney," and some of these were prevailed upon to buy additional barrels of Bernheim (R. 189, 208-209, 223-224, 252-253). The salesmen continued to guarantee orally the amount the customers would receive (R. 93-94, 124, 224, 252-253), and continued to state that Consoli-

dated's only interest was in its commission (R. 123). The fall of 1940 was given as the bottling date (R. 92-93). Petitioner made promises of this nature himself (R. 208-209), and he knew that they were being made by the salesmen (R. 243, see Gov. Ex. 193).[5]

In reality Consolidated never had authority to use the "I. W. Harper" label (R. 262). Although the customers were never informed of the fact, and although petitioner denied it when questioned by a post office investigator, the Bernheim whiskey which was traded to the customers was held by third parties at the time of the trades as security for loans to Consolidated (R. 320-328, 432). Consolidated made a considerable profit on the Bernheim it traded to the customers (R. 363-380), but the customers were not informed of this (R. 672, 738). Consolidated disposed of the whiskey it received in the trades without loss (R. 363-380) and in at least one instance at a profit (R. 376). Frequently the customer, who had understood in dealing with the salesman that he was making an even trade, was later informed by petitioner that he owed Consolidated a balance on the deal (R. 147, 221, 255, 258).

When the Bernheim had attained its four-year maturity and was available for bottling in bond in

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[5] The exhibits have not been brought up to this Court with the record, but we know the nature of a great many of them from the briefs filed in the circuit court of appeals.

the fall and winter of 1940-1941, the customers were approached with the proposal of a new "switch." They were told that because of the new federal tax the whiskey market was depressed and that it would not be profitable to bottle the Bernheim at that time. They were advised to switch from Bernheim to "green" whiskies which could soon be used in "blends," in view of the coming market for such products. Again there were promises of increased profits. Many, accordingly, switched to Loretto, Meadowlawn, or Kentucky Senate of recent distillation and executed new "powers of attorney" designating Consolidated bottling agent. (R. 103-104, 128-129, 162, 190, 215, 226, 234, 246, 254, 265, 272.) Consolidated again took a secret profit on the exchange; and the receipts covering the "green" whiskey had already been pledged to cover its loans (R. 366, 370, 372, 374, 380).

Despite its meager capitalization, Consolidated did a cash business of approximately $2,000,000 during the two and one-half years of its existence (R. 357). Very little bottling, however, was effected. The corporation's books show that, while it acquired about 31,000 barrels of whiskey from its customers (R. 311), it caused to be bottled only about 1,200 barrels (R. 314), and it paid to them on the bottling contracts only about $16,000 (R. 358). In a number of cases, after the customer had been switched from his original holding into a

"green" whiskey, the original whiskey would be bottled and sold for Consolidated's account (R. 689-695).

On September 4, 1941, petitioner caused Consolidated to file a petition for reorganization and its assets were thereafter turned over to a Trustee in Bankruptcy (R. 638-642). As of that day Consolidated owed its customers 13,811 barrels of whiskey under the bottling powers of attorney (R. 314). To fulfill these contracts it had 14,194 barrels, but all of these had been pledged to creditors to secure loans amounting to $340,207.72 (R. 315-318) which it would have been necessary to pay off before the liquor could have been released for bottling (R. 352-353).

During the course of the trial the Government proved the mailing of the various letters alleged to have been mailed in those substantive counts of which petitioner was ultimately convicted.

ARGUMENT

1. We think it will be obvious to the Court from a reading of the above Statement that there is no merit to petitioner's contention (Pet. 8, 13, 33-34, 67-72) that the Government failed to produce substantial proof of the material allegations of the indictment. One need only glance at the tricky and dishonest "power of attorney" under which the customer surrendered his warehouse receipt and received no definite promise in return, and under which Consolidated, though acting as agent,

took a secret profit and transferred to the customer other whiskey which it had already pledged as security for its own loans. The exhibits contain a mass of correspondence which shows that petitioner was repeatedly put on notice of the statements of his salesmen and that he consistently evaded explanation (see, e.g., Gov. Ex. 193, 194). It is, of course, unnecessary in a prosecution for using the mails in furtherance of a scheme to defraud that all the alleged false representations be proven. *Holmes* v. *United States,* 134 F. 2d 125, 133 (C. C. A. 8), certiorari denied, 319 U. S. 776; *Baker* v. *United States,* 115 F. 2d 533, 542 (C. C. A. 8), certiorari denied, 312 U. S. 692; *United States* v. *Dilliard,* 101 F. 2d 829, 833 (C. C. A. 2), certiorari denied, 306 U. S. 635.

2. Petitioner contends that he has been subjected to double punishment since he was convicted of both the substantive offenses and conspiracy. The argument is that where two or more are alleged to have used the mails in furtherance of a fraudulent scheme, proof of the substantive charge includes all the elements of the conspiracy (Pet. 6, 9-10, 26-27, 43-49). We think it unnecessary to answer this contention[6] since there is sufficient evidence to sup-

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[6] We do not agree, however, that *Freeman* v. *United States,* 146 F. 2d 978 (C. C. A. 6), upon which petitioner relies, is a correct statement of the law. See *Beckett* v. *Hudspeth,* 131 F. 2d 195, 196 (C. C. A. 10); *Wilkes* v. *United States,* 80 F. 2d 285, 288 (C. C. A. 9); *Freeman* v. *United States,* 244 Fed. 1, 19 (C. C. A. 7).

port petitioner's conviction under the substantive counts and the shorter term under the conspiracy count runs concurrently. *Hirabayashi* v. *United States,* 320 U. S. 81, 105.

3. Petitioner contends that the indictment was defective in that it failed to set forth the details of the alleged fraudulent scheme with sufficient particularity as to time, place and circumstances (Pet. 8, 13, 35, 73-76). But "in such an indictment, 'while particulars of the scheme are matters of substance and must be described with certainty sufficient to show its existence and character and to fairly acquaint the accused with the particular fraudulent scheme charged against them, the scheme itself need not be pleaded with all the certainty as to time, place and circumstance requisite in charging the gist of the offense, the mailing of the letter or other article in execution or attempted execution of the same.' " *Hass* v. *United States,* 93 F. 2d 427, 429 (C. C. A. 8); see also *United States* v. *Crummer,* 151 F. 2d 958, 963 (C. C. A. 10), certiorari denied, 327 U. S. 785. Here the time and place of mailing the letters was particularly described. The other matters of which petitioner complains fall rather within the scope of a bill of particulars. *Glasser* v. *United States,* 315 U. S. 60, 66.

4. Petitioner contends that the trial court erred in excluding certain evidence offered on the issue of his intent to perform the bottling contracts (Pet.

6, 9, 24-25, 36-43). The court permitted petitioner to introduce a great quantity of evidence to show that Consolidated had made extensive preparations for bottling (R. 507-510, 519-540) and that it had initiated a bottling and sales program (R. 540-566; see also R. 739-740, 742-743, 755-756, 762-763, 769). For its relevance to this issue of intent the court also permitted petitioner to introduce a considerable amount of evidence designed to show that a large competitor (Schenley) had taken active steps to defeat the bottling program in the fall of 1940 (R. 566-573, 587-589, 644-645, 745), that Consolidated's largest creditor (Klein) blocked the bottling program in September 1941 by refusing to turn over the warehouse receipts he held as security except after endorsing them "without recourse" (R. 602-615), and that as a result petitioner voluntarily took Consolidated into bankruptcy (R. 640, 779-780). All this evidence was obviously cumulative on the issue of intent; moreover, petitioner's difficulties with third parties presented collateral matters likely to confuse the jury, and the court quite properly stopped petitioner's attorney from going into details (see, e.g., R. 164-165, 186-187, 590, 638-643). Despite the court's repeated warnings, petitioner's attorney recurred to these excluded matters in his closing argument, and, when stopped by the court, he remarked to the jury, "Well, you see the search after the truth still fails, ladies and gentlemen." As a result of this,

the court again carefully instructed the jury that they should give no consideration to these collateral issues, that "a limited amount of evidence was admitted concerning" them to show petitioner's intent, and that they should disregard everything except "the evidence as you heard it from the witness stand."[7] (R. 813-816.) We think the trial court clearly acted with discretion in excluding evidence which was both collateral and cumulative. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 230; *Grell* v. *United States*, 112 F. 2d 861, 875 (C. C. A. 8). This is particularly true here, where petitioner's intent to bottle was not necessarily crucial, since he could have been convicted on the evidence of the secret profits alone.

5. Petitioner contends (R. 6, 10, 27-28, 49-53) that Consolidated's account books were received in evidence without the foundation for their authenticity required by the statute (28 U. S. C. 695, *supra*, p. 4). Identification was made by an employee who testified that she had worked on some of the books, that she was familiar with all of them, that they were kept in the regular course of

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[7] Petitioner argues that by this instruction the court intended to exclude from the jury's consideration all evidence previously admitted on these collateral matters. We think it clear, however, from the quoted language that the court merely meant to tell the jury that, while they could consider the fact of interference with the bottling program, they were to exclude from consideration all details of Consolidated's collateral difficulties.

Consolidated's business, and that the entries were made at or about the time of the transaction recorded (R. 281-285). The Government's accountant witnesses were cross-examined at length as to their summaries of the books (R. 335-353, 381-425) and petitioner himself specifically referred to them at at least one point (R. 555). We submit that on the record there can be no doubt that these were Consolidated's books. Nor does petitioner contend that they were not. His objections go rather to the weight to be accorded to the evidence extracted from them.

6. Petitioner contends that the trial court erred in permitting the postal inspector who investigated Consolidated to testify as to opinions he formed, on the ground that such evidence was irrelevant and hearsay (Pet. 7, 10-11, 28, 53-55). The inspector testified to statements made to him by petitioner relative to complaints filed with the Post Office Department by several of Consolidated's customers (R. 427-437). Such evidence was clearly relevant, and it was properly admitted in evidence as petitioner's own admission. 4 Wigmore, *Evidence* (3rd ed. 1940), § 1048. The only expression of opinion by the inspector was excluded by the court (R. 434-435). The other alleged expression of opinion was in reality a question addressed to petitioner by the inspector (R. 430-431). We submit that the contention is without merit.

7. It is said that the trial judge displayed such obvious bias and hostility as to deprive petitioner of a fair trial (Pet. 7, 11, 29-30, 55-59). But we submit that the group of incidents under this section of the petition, culled from the record of a five-weeks trial, do not, when read in context, reveal any unfairness. It is true that the judge on occasion spoke sharply to defense counsel. But rightly so, for he was sorely tried by their conduct. Despite an agreement designed to prevent unnecessary objections (R. 81, 780), defense counsel repeatedly interposed objections where it was obvious that they had already properly saved the point in the record (see, e.g., R. 88-89, 91-92, 146, 238, 242, 364-371). And, despite the court's repeated and clear rulings, defense counsel never ceased in their efforts to get before the jury the details of the collateral Klein and Schenley affairs and the bankruptcy proceedings (see, e.g., R. 151, 164-165, 198-204, 258, 530, 745-750, 760, 766), culminating eventually in the contemptuous remark to the jury mentioned above (*supra*, p. 14). Most of the incidents complained of here would have been perfectly proper under any circumstances; the court's occasional severity defense counsel brought upon themselves.

8. Petitioner contends that he was deprived of a fair trial by reason of statements in the prosecutor's closing argument to the effect that he had duped the investors, and that he was a liar, a thief,

a confidence man and an old hand at the game (Pet. 7, 11-12, 30-31, 59-64). These statements, with the exception of one, were within the evidence and therefore not improper. *United States* v. *Socony-Vacuum Oil Co., supra,* at 238-239; *Stephan* v. *United States,* 133 F. 2d 87, 98 (C. C. A. 6), certiorari denied, 318 U. S. 781; *United States* v. *Holt,* 108 F. 2d 365, 369 (C. C. A. 7), certiorari denied, 309 U. S. 672; *United States* v. *Wexler,* 79 F. 2d 526, 530 (C. C. A. 2), certiorari denied, 297 U. S. 703. Although there was no evidence to support the prosecutor's remark that the defendants were old hands at the game, no prejudice resulted since prompt apology was made and the jury were instructed three times to ignore the matter (R. 793, 794, 813). *United States* v. *Socony-Vacuum Oil Co., supra,* at 242, 243.

9. In our opinion the trial court's final instructions (R. 795-816, 840-842) were fair and adequate when read as a whole in the light of the evidence, and we think petitioner's complaints on this score are without merit (Pet. 7-8, 12, 31-32, 64-67). As we have already pointed out, we think petitioner misinterprets the charge in stating that it excluded all the evidence previously admitted relative to the bankruptcy proceeding and the Schenley and Klein matters (see fn. 7, *supra,* p. 15).

CONCLUSION

The decision of the circuit court of appeals is correct and no conflict of decision is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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